

6

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

vs.

THE UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.**

PETITION FOR CERTIORARI FILED APRIL 5, 1913.

CERTIORARI AND RETURN FILED MAY 23, 1913.

(23,620)

(23,620)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption	a
Transcript from the district court of the United States for the district of Alaska, division No. 1.....	1
Præcipe for record.....	1
Indictment.....	2
Bench warrant.....	137
Arraignment.....	139
Bail bond.....	140
Demurrer to indictment.....	142
Order overruling demurrer.....	143
Plea of C. M. Summers.....	144
Motion to change place of trial.....	145
Affidavit of C. M. Summers.....	145
L. P. Shackelford.....	146
B. L. Lane.....	149
J. P. Olds.....	150
H. J. Raymond.....	152
J. R. Whipple.....	154
Order granting motion to change place of trial.....	156
Order continuing time for setting for trial.....	157
Order as to telegrams Nos. 1 to 38.....	157

	Original. Print
Order transferring cause to Ketchikan.....	160
Order continuing trial.....	161
Orders continuing trial.....	162
Order overruling demurrer.....	163
Motion for continuance.....	164
Affidavit of C. M. Summers.....	165
L. P. Shackelford.....	168
Notice of election of defendant C. M. Summers to stand on demurrer...	171
Objection to proceeding under section 97 of Alaska Code.....	172
Affidavit of John Rustgard.....	173
Louis P. Shackelford.....	178
Minutes of proceedings prior to sentence.....	180
Judgment and sentence.....	182
Bond on writ of error.....	185
Petition for writ of error and allowance.....	188
Assignment of errors.....	189
Writ of error.....	191
Citation and service.....	193
Order extending time for filing transcript.....	195
Clerk's certificate.....	196
Order to refile record <i>nunc pro tunc</i> as of August 10, 1912.....	201
Order of submission.....	202
Opinion.....	203
Judgment.....	213
Order extending time to file petition for rehearing.....	214
Clerk's certificate.....	216
Writ of certiorari.....	217
Supplemental transcript.....	217
Petition for rehearing.....	218
Opinion on petition for rehearing.....	220
Order denying petition for rehearing.....	221
Clerk's certificate.....	222
Stipulation as to return to writ of certiorari.....	223
Return to writ of certiorari.....	223

No. 2177

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court
of the District of Alaska, Division No. 1.**

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of J. P. Olds in Support of Motion to Change Place of Trial.....	150
Affidavit of H. J. Raymond in Support of Mo- tion to Change Place of Trial.....	152
Affidavit of John Rustgard in Answer to Affi- davits of C. M. Summers and Lewis P. Shackleford, and in Opposition to Motion for a Continuance.....	173
Affidavit of Louis P. Shackleford.....	178
Affidavit of L. P. Shackleford in Support of Mo- tion for Continuance.....	168
Affidavit of L. P. Shackleford in Support of Mo- tion to Change Place of Trial.....	146
Affidavit of C. M. Summers in Support of Mo- tion for Continuance.....	165
Affidavit of C. M. Summers in Support of Mo- tion to Change Place of Trial.....	145
Affidavit of B. L. Thane in Support of Motion to Change Place of Trial.....	149
Affidavit of J. R. Whipple in Support of Motion to Change Place of Trial.....	154
Arraignment.....	139

Index.	Page
Assignment of Errors.....	189
Bail Bond.....	140
Bench Warrant.....	137
Bond on Writ of Error.....	185
Citation.....	193
Clerk's Certificate.....	195
Count One.....	2
Count Two.....	5
Count Three.....	8
Count Four.....	11
Count Five.....	14
Count Six.....	16
Count Seven.....	19
Count Eight.....	22
Count Nine.....	25
Count Ten.....	27
Count Eleven.....	30
Count Twelve.....	33
Count Thirteen.....	36
Count Fourteen.....	39
Count Fifteen.....	41
Count Sixteen.....	44
Count Seventeen.....	47
Count Eighteen.....	50
Count Nineteen.....	53
Count Twenty.....	55
Count Twenty-one.....	58
Count Twenty-two.....	61
Count Twenty-three.....	63
Count Twenty-four.....	66
Count Twenty-five.....	69
Count Twenty-six.....	72

Index.	Page
Count Twenty-seven.....	74
Count Twenty-eight.....	76
Count Twenty-nine.....	78
Count Thirty.....	80
Count Thirty-one.....	82
Count Thirty-two.....	84
Count Thirty-three.....	86
Count Thirty-four.....	88
Count Thirty-five.....	90
Count Thirty-six.....	92
Count Thirty-seven.....	94
Count Thirty-eight.....	96
Count Thirty-nine.....	98
Count Forty.....	100
Count Forty-one.....	101
Count Forty-two.....	104
Count Forty-three.....	106
Count Forty-four.....	108
Count Forty-five.....	110
Count Forty-six.....	112
Count Forty-seven.....	114
Count Forty-eight.....	116
Count Forty-nine.....	118
Count Fifty.....	120
Count Fifty-one.....	122
Count Fifty-two.....	124
Count Fifty-three.....	126
Count Fifty-four.....	128
Count Fifty-five.....	129
Count Fifty-six.....	132
Demurrer.....	142

Index.	Page
Indictment.....	2
Judgment and Sentence.....	182
Minute Order of Court Proceedings Prior to Signing of Sentence.....	180
Motion for Continuance.....	164
Motion to Change of Place of Trial.....	145
Notice of Election of Defendant C. M. Summers to Stand on Demurrer.....	171
Objection to Proceeding Under Section 97, Alaska Code.....	172
Order Continuing Trial (Dated May 6, 1912)...	161
Order Continuing Trial (Dated May 13, 1912)..	162
Order Continuing Trial (Dated May 17, 1912)..	162
Order Extending Time for Filing Transcript of Record.....	194
Order in the Matter of Setting for Trial.....	156
Order Overruling Demurrer.....	143
Order Overruling Demurrer After Resubmission	163
Order Re Subpoena to P. P. Floyd.....	157
Order Setting Cause for Trial.....	156
Order Transferring Cause to Ketchikan.....	160
Petition for Writ of Error and Order Allowing Same.....	188
Plea of C. M. Summers.....	144
Praecipe for Record.....	1
Writ of Error.....	191

[Praeceptum for Record.]
SHACKLEFORD & BAYLESS,
Attorneys and Counsellors at Law,
Juneau, Alaska.

July 29, 1912.

Clerk District Court,
Division No. 1,
Juneau, Alaska.

Dear Sir:

Please prepare the transcript of the record for appeal in the case of the United States vs. C. M. Summers, Cause No. 821-B in the District Court, and certify the following papers, to wit:

1. Copy of the indictment;
2. Copy bail bond;
3. Copy demurrer;
4. Copy order overruling demurrer Jan. 8th, 1912;
5. Copy order rehearing demurrer and overruling the same May 18, 1912;
6. Copy election not to plead but to stand on the demurrer;
7. Judgment on the demurrer and sentence;
8. Appeal papers:
 - a. Petition for appeal;
 - b. Order allowing appeal;
 - c. Writ of error;
 - d. Citation;
 - e. Assignment of errors;
 - f. ~~Order fixing bail~~;
 - g. Bail bond;
 - h. Order extending time for filing transcript to August 15, 1912.

When so prepared you will kindly transmit this record to the Clerk of the United States Circuit Court of Appeals at San Francisco.

Very truly yours,

LEWIS P. SHACKLEFORD.

By W. S. BAYLESS.

[Endorsed]: Filed July 29, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [1*]

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Indictment.

At the regular term of the District Court of the United States of America, within and for the District of Alaska, Division Number One thereof, in the year of our Lord one thousand nine hundred and twelve, begun and held at Juneau, in said District and Division, beginning the 3d day of January, A. D. 1912.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, accuse C. M. Summers and Stewart G. Holt by this indictment as follows:

COUNT ONE.

The Grand Jurors aforesaid, upon their oaths

*Page-number appearing at foot of page of original certified Record.

aforesaid, do present that heretofore, to wit, on the nineteenth day of January, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain National Banking Association, then and there known and [2] designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 869 thereof, a certain false entry to the effect that on that date the sum of Six Thousand Eight Hundred and Sixty-four Dollars and Forty-five cents (\$6,864.45) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which en-

try was then and there in words and figures as follows, to wit:

“Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . . \$6,864.45”
and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand Eight Hundred and Sixty-four Dollars and Forty-five Cents (\$6,864.45) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of [3] business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Twenty-five Thousand Dollars (\$125,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand Eight Hundred and Sixty-four Dollars and Forty-five Cents (\$6,864.45) nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit

in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Twenty-five Thousand Dollars (\$125,000), to wit, the sum of One Hundred and Seventy-one Thousand Five Hundred and Fourteen Dollars and Fifty-six Cents (\$171,514.56), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there, when so making said entry, well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association [4] and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.

COUNT TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 28th day of January, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there

the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain National Banking Association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 873 thereof, a certain false entry to the effect that on that date the sum of Forty-eight Thousand and Forty-five Dollars and Seventy-five Cents (\$48,045.75) was transferred by said association to the Assistant United States Treasurer [5] at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...48,045.75"

and which said entry so as aforesaid made in said book then and there purporting to show, and did

in substance and effect indicate and declare, that the sum of Forty-eight Thousand and Forty-five Dollars and Seventy-five Cents (\$48,045.75) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Twenty-five Thousand and Four Hundred Dollars (\$125,400);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Forty-eight Thousand and Forty-five Dollars and Seventy-five Cents (\$48,045.75), nor any [6] portion thereof, had at that time been or was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hun-

dred and Twenty-five Thousand and Four Hundred Dollars, (\$125,400) to wit, the sum of One Hundred and Ninety-seven Thousand Four Hundred and Seventy-seven Dollars and Fourteen Cents (\$197,477.14), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of such association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [7]

COUNT THREE.

That the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 21st day of March, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and

established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there willfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 903 thereof, a certain false entry to the effect that on that date the sum of Fifty-five Thousand Six Hundred and Eighty-six Dollars and Ninety Cents (\$55,686.90) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which [8] entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . .55,686.90"
and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Fifty-five Thousand Six Hundred and Eighty-six Dollars and Ninety Cents (\$55,686.90) was then and there transferred and paid over by the said First National Bank of Juneau to the As-

sistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Fifty-five Thousand Six Hundred and Eighty-six Dollars and Ninety Cents (\$55,686.90) nor any portion thereof had at that time been nor was at that time so transferred by the said association or [9] any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Fifty-three Thousand Seven Hundred and Thirty-two Dollars and Sixty-five Cents (\$253,732.65), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so

made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [10]

COUNT FOUR.

That the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 22d day of March, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and

then and there designated and known as "Journal D," on page 905 thereof, a certain false entry to the effect that on that date the sum of One Thousand and Seventeen Dollars and Seventy-three Cents (\$1,017.73) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, [11] out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . 1,017.73"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of One Thousand and Seventeen Dollars and Seventy-three Cents (\$1,017.73) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of One Thousand and Seventeen Dollars and Seventy-three Cents (\$1,017.-73), nor any portion thereof, had at that time been nor was at that time so transferred by the said association or any of [12] its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau, to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States, and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Fifty-four Thousand Seven Hundred and Fifty Dollars and Thirty-eight Cents (\$254,750.38), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Stat-

utes in such case made and provided, and against the peace and dignity of the United States. [13]

COUNT FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 11th day of April, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 917 thereof, a certain false entry to the effect that on that date the sum of Five Thousand Two Hundred and Sixty Dollars and Seventy-five Cents (\$5,260.75) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits [14] with said Association to the credit of the Treasurer of the United States, which entry was made as a debit

item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit: "Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . . 5,260.75

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Five Thousand Two Hundred and Sixty Dollars and Seventy-five Cents (\$5,260.75) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Five Thousand Two Hundred and Sixty Dollars and Seventy-five Cents (\$5,260.75) nor [15] any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum

last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Twenty-nine Thousand Eight Hundred and Twenty-one Dollars and Thirty-eight Cents (\$229,821.38), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [16]

COUNT SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 14th day of April, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said

C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 919 thereof, a certain false entry to the effect that on that date the sum of Two Thousand Four Hundred and Twenty-two Dollars and Forty-seven Cents (\$2,422.47) was transferred by said association to the Assistant United States Treasurer at San Francisco, [17] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco . . . 2,422.47"

and which said entry so as aforesaid made in said book then and there purporting to show and did in

substance and effect indicate and declare that the sum of Two Thousand Four Hundred and Twenty-two Dollars and Forty-seven Cents (\$2,422.47) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars and Two Cents (\$150,000.02) ;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Two Thousand Four Hundred and Twenty-two Dollars and Forty-seven Cents (\$2,422.47) nor [18] any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States, a sum greater than One Hundred and

Fifty Thousand Dollars and Two Cents (\$150,000.02), to wit, the sum of Two Hundred and Thirty-two Thousand Eight Hundred and Fifty Dollars and Twenty-nine Cents (\$232,850.29), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the United States. [19]

COUNT SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 16th day of April, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said

town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and know as "Journal D," on page 921 thereof, a certain false entry to the effect that on that date the sum of Two Thousand One Hundred and Fifty-six Dollars and Two Cents (\$2,156.02) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, [20] out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....2,156.02"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Two Thousand One Hundred and Fifty-six Dollars and Two Cents (\$2,156.02) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association

to the credit of the Treasurer of the United States, and that at the close of business hours of said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Two Thousand One Hundred and Fifty-six Dollars and Two Cents (\$2,156.02) nor any portion thereof had at that time been nor was at that [21] time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, Two Hundred and Thirty-five Thousand and Six Dollars and Twenty-nine Cents (\$235,006.29), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the

said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [22]

COUNT EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 3d day of May, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then and there existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated

and known as "Journal D," on page 933 thereof, a certain false entry to the effect that on that date the sum of Eight Thousand Six Hundred and Sixteen Dollars and Fifty-four Cents (\$8,616.54) was transferred by said association to the Assistant United States Treasurer at San Francisco, [23] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...8,616.54"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Eight Thousand Six Hundred and Sixteen Dollars and Fifty-four Cents (\$8,616.54) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Eight Thousand Six Hundred and Sixteen Dollars and Fifty-four Cents (\$8,616.54) nor [24] any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Eighty-four Thousand Six Hundred and Eighty-nine Dollars and Ninety-five Cents (\$184,689.95), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer or the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said

association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [25]

COUNT NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 4th day of May, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 933 thereof, a certain false entry to the effect that on that date the sum of Eight Thousand One Hundred and Seventy-one Dollars and Thirty-five Cents (\$8,171.35) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, [26] out of the funds and deposits with said

association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco....8,171.35"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Eight Thousand One Hundred and Seventy-one Dollars and Thirty-five Cents (\$8,171.35) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Eight Thousand One Hundred and Seventy-one Dollars and Thirty-five Cents (\$8,171.35) [27] nor any portion thereof had at that time been nor was at that time so trans-

ferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety-two Thousand Eight Hundred and Sixty-one Dollars and Thirty Cents (\$192,861.30), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [28]

COUNT TEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 5th day of May, A. D. 1910, in the town of

Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," page 935 thereof, a certain false entry to the effect that on that date the sum of Six Thousand Three Hundred and Fifty-two Dollars and Fifteen Cents (\$6,352.15) was transferred by said association to the Assistant United States Treasurer at San Francisco, [29] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

“Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . 6,352.15”

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand Three Hundred and Fifty-two Dollars and Fifteen Cents (\$6,352.15) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand Three Hundred and Fifty-two Dollars and Fifteen Cents (\$6,352.15) [30] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and

at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety-nine Thousand Two Hundred and Thirteen Dollars and Forty-five Cents (\$199,213.45), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [31]

COUNT ELEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 9th day of May, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking

association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 937 thereof, a certain false entry to the effect that on that date the sum of Sixteen Thousand Three Hundred and Twenty-eight Dollars and Sixty-eight Cents (\$16,328.68) was transferred by said association to the Assistant United States Treasurer at San Francisco, [32] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...16,328.68"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Sixteen Thousand Three Hundred and

Twenty-eight Dollars and Sixty-eight Cents (\$16,328.68) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Sixteen Thousand Three Hundred and Twenty-eight Dollars and Sixty-eight Cents (\$16,328.68) nor any portion thereof had at that [33] time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two

Hundred and Sixteen Thousand Five Hundred and Ninety-one Dollars and Ninety-two Cents (\$216,591.92), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [34]

COUNT TWELVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 3d day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business

at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 957 thereof, a certain false entry to the effect that on that date the sum of Six Thousand One Hundred and Thirty Dollars and Twenty Cents (\$6,130.20) was transferred by said association to the Assistant United States Treasurer [35] at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . 6,130.20"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand One Hundred and Thirty Dollars and Twenty Cents (\$6,130.20) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association

to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand and Twenty Dollars (\$150,020);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand One Hundred and Thirty Dollars and Twenty Cents (\$6,130.20) nor any portion [36] thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand and Twenty Dollars (\$150,020), to wit, the sum of Two Hundred and Fifteen Thousand Seven Hundred and Thirty-four Dollars and Forty-eight Cents (\$215,734.48), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the

intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [37]

COUNT THIRTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 4th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and

known as "Journal D," on page 957 thereof, a certain false entry to the effect that on that date the sum of Ten Thousand Seven Hundred and Thirty-two Dollars and Thirty-four Cents (\$10,732.34) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the [38] funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...10,732.34"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Ten Thousand Seven Hundred and Thirty-two Dollars and Thirty-four Cents (\$10,732.34) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand and Twenty Dollars (\$150,020);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Ten Thousand Seven Hundred and Thirty-two Dollars and Thirty-four Cents (\$10,732.34) [39] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand and Twenty Dollars (\$150,020), to wit, the sum of Two Hundred and Twenty-six Thousand Four Hundred and Sixty-six Dollars and Eighty-two Cents (\$226,466.82), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to ex-

amine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [40]

COUNT FOURTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 9th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 961 thereof, a certain false entry to the effect that on that date the sum of Three Thousand Nine Hundred and Eighty-four Dollars and Seventy-two Cents (\$3,984.72) was transferred by said association to the Assistant United States Treasurer at San Francisco, [41]

California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco... 3,984.72"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Three Thousand Nine Hundred and Eighty-four Dollars and Seventy-two Cents (\$3,984.72) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Three Thousand Nine Hundred and Eighty-four Dollars and Seventy-two Cents (\$3,984.72) nor any portion thereof had

at that time [42] been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Nine Thousand Nine Hundred and Eighty-nine Dollars and Thirteen Cents (\$209,989.13), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [43]

COUNT FIFTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit,

on the 11th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 963 thereof, a certain false entry to the effect that on that date the sum of Five Thousand Seven Hundred and Twelve Dollars and Fifteen Cents (\$5,712.15) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association [44] to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . . 5,712.15"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Five Thousand Seven Hundred and Twelve Dollars and Fifteen Cents (\$5,712.15) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Five Thousand Seven Hundred and Twelve Dollars and Fifteen Cents (\$5,712.15) [45] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and

at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Fifteen Thousand Seven Hundred and Six Dollars and Seventy-six Cents (\$215,706.76), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [46]

COUNT SIXTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 14th day of June, A. D. 1910, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers, and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking as-

sociation then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D," on page 965 thereof, a certain false entry to the effect that on that date the sum of Two Thousand Two Hundred and Ninety-nine Dollars and Ninety-nine Cents (\$2,299.99) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and [47] deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco . . . 2,299.99"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Two Thousand Two Hundred and Ninety-

nine Dollars and Ninety-nine Cents (\$2,299.99) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Forty-nine Thousand Nine Hundred and Ninety-nine Dollars and Ninety-two Cents (\$149,999.92);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Two Thousand Two Hundred and Ninety-nine Dollars and Ninety-nine Cents (\$2,299.99) [48] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Forty-nine Thousand Nine Hundred and Ninety-nine Dollars and Ninety-two Cents (\$149,999.92), to wit,

the sum of Two Hundred and Eighteen Thousand and Six Dollars and Sixty-seven Cents (\$218,006.67), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [49]

COUNT SEVENTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 22d day of April, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and Dis-

trict aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 171 thereof, a certain false entry to the effect that on that date the sum of Ten Thousand Five Hundred and Twenty-four Dollars and Sixty-five Cents (\$10,524.65) was transferred by said association to the Assistant [50] United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . . 10,524.65"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Ten Thousand Five Hundred and Twenty-four Dollars and Sixty-five Cents (\$10,524.65) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the

United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000) ;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Ten Thousand Five Hundred and Twenty-four Dollars and Sixty-five [51] Cents (\$10,524.65) nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety-one Thousand Seven Hundred and Ninety-five Dollars and Thirty-one Cents (\$191,795.31), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C.

M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.
[52]

COUNT EIGHTEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 29th day of April, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States, pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and

known as "Journal D-A," on page 175 thereof, a certain false entry to the effect that on that date the sum of One Thousand Seven Hundred and Sixty Dollars and Fourteen Cents (\$1,760.14) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of [53] the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Dept. Ass't Tr. U. S.

S. F.....1,760.14"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of One Thousand Seven Hundred and Sixty Dollars and Fourteen Cents (\$1,760.14) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of the business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of One Thousand Seven Hundred and Sixty Dollars and Fourteen Cents (\$1,760.14) nor any [54] portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Seventy-two Thousand Nine Hundred and Thirty-seven Dollars and Five Cents (\$172,937.05), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against

the peace and dignity of the United States. [55]

COUNT NINETEEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 4th day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 181 thereof, a certain false entry to the effect that on that date the sum of Thirteen Thousand Three Hundred and Seven Dollars and Ninety-seven Cents (\$13,307.97) was transferred by said association to the Assistant United States Treasurer at San Francisco, [56] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known

and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...13,307.97"
and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Thirteen Thousand Three Hundred and Seven Dollars and Ninety-seven Cents (\$13,307.97) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Thirteen Thousand Three Hundred and Seven Dollars and Ninety-seven Cents (\$13,307.97) nor any [57] portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the

said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety Thousand and Fifty-seven Dollars and Ninety-one Cents (\$190,057.91), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [58]

COUNT TWENTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 6th day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers, and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he,

the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association, then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 183 thereof, a certain false entry to the effect that on that date the sum of Four Thousand and Thirty-three Dollars and Fifty-two Cents (\$4,033.52) was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of [59] the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . . 4,033.52"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum

of Four Thousand and Thirty-three Dollars and Fifty-two Cents (\$4,033.52) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false, in this, that neither the sum of Four Thousand and Thirty-three Dollars and Fifty-two Cents (\$4,033.52) nor any portion thereof had at that [60] time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety-four Thousand and Ninety-one Dollars

and Forty-three Cents (\$194,091.43), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [61]

COUNT TWENTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 8th day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there

wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 183 thereof, a certain false entry to the effect that on that date the sum of Three Thousand Seven Hundred and Fifty-two Dollars and Forty-one Cents (\$3,752.41) [62] was transferred by said association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Dep. Asst. Treas.

U. S. 3,752.41"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Three Thousand Seven Hundred and Fifty-two Dollars and Forty-one Cents (\$3,752.41) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National

Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Three Thousand Seven Hundred and Fifty-two Dollars and Forty-one Cents (\$3,752.41) [63] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety-seven Thousand Eight Hundred and Forty-three Dollars and Eighty-four Cents (\$197,843.84), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to

deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [64]

COUNT TWENTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 31st day of May, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers, and said Stewart G. Holt, he, the said C. M. Summers being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and know as "Journal D-A," on page 197 thereof, a certain false entry to the effect that on that date the sum of Six Thousand Nine Hundred and Fifty-eight Dollars and Fifty-three Cents (\$6,958.53) was transferred by

said association to the Assistant [65] United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . .6,958.53"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Six Thousand Nine Hundred and Fifty-eight Dollars and Fifty-three Cents (\$6,958.53) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Six Thousand Nine Hundred and Fifty-eight Dollars and Fifty-three

Cents (\$6,958.53) [66] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau, to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of One Hundred and Ninety-four Thousand Four Hundred and Ninety Dollars and Fifty-two Cents (\$194,490.52), as he, the said C. M. Summers, President, and he the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency, and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [67]

COUNT TWENTY-THREE.

And the Grand Jurors aforesaid, upon their oaths

aforesaid, do further present that heretofore, to wit, on the 3d day of June, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 199 thereof, a certain false entry to the effect that on that date the sum of Ten Thousand Nine Hundred and Ninety-eight Dollars and Thirty-two Cents (\$10,998.32) was transferred by said association to the Assistant United States Treasurer at San Francisco, [68] California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:

“Treas. U. S.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco...10,998.32”

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Ten Thousand Nine Hundred and Ninety-eight Dollars and Thirty-two Cents (\$10,998.32) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Ten Thousand Nine Hundred and Ninety-eight Dollars and Thirty-two Cents (\$10,998.32) [69] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at

such time there remained on deposit with said association to the credit of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Seven Thousand Nine Hundred and Forty-six Dollars and Nine Cents (\$207,946.09), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [70]

COUNT TWENTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 29th day of June, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and des-

ignated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 219 thereof, a certain false entry to the effect that on that date the sum of Seven Thousand Two Hundred and Forty-nine Dollars and Sixty Cents (\$7,249.60) was transferred by said association to the Assistant United States [71] Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to-wit:

"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . . 7,249.60"

and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Seven Thousand Two Hundred and Forty-nine Dollars and Sixty Cents (\$7,249.60) was

then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First National Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Seven Thousand Two Hundred and Forty-nine Dollars and Sixty Cents (\$7,249.60), [72] nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Fourteen Thousand Seven Hundred and Forty-one Dollars and Thirty-one Cents (\$214,741.31), as he, the said C. M. Summers,

President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.
[73]

COUNT TWENTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the 30th day of June, A. D. 1911, in the town of Juneau, in Division Number One, District of Alaska, and within the jurisdiction of this court, said C. M. Summers and said Stewart G. Holt, he, the said C. M. Summers, being then and there the President, and he, the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association then and there known and designated as First National Bank of Juneau, which said association theretofore had been duly organized and established and was then existing and doing business at the said town of Juneau, in the Division and District aforesaid, under the laws of the United States pertaining to national banking associations, did then

and there wilfully, unlawfully, fraudulently and wrongfully make in a certain book then and there belonging to and in use by the said association in transacting its said banking business and in keeping its accounts and then and there designated and known as "Journal D-A," on page 219 thereof, a certain false entry to the effect that on that date the sum of Eleven Thousand Four Hundred and Nineteen Dollars and Seventy-six Cents (\$11,419.76) was transferred by said [74] association to the Assistant United States Treasurer at San Francisco, California, out of the funds and deposits with said association to the credit of the Treasurer of the United States, which entry was made as a debit item of a certain account known and designated as "Treasurer United States," and which entry was then and there in words and figures as follows, to wit:
"Treasurer United States.

Transfer Excess Deposits to Asst.

Treas. U. S. at San Francisco. . . 11,419.76"
and which said entry so as aforesaid made in said book then and there purporting to show and did in substance and effect indicate and declare that the sum of Eleven Thousand Four Hundred and Nineteen Dollars and Seventy-six Cents (\$11,419.76) was then and there transferred and paid over by the said First National Bank of Juneau to the Assistant United States Treasurer at San Francisco, California, out of the funds on deposit in and with said association to the credit of the Treasurer of the United States, and that at the close of business hours on said day there remained in said First Na-

tional Bank of Juneau to the credit of the Treasurer of the United States and the various disbursing officers of the United States no more than One Hundred and Fifty Thousand Dollars (\$150,000);

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there wholly false in this, that neither said sum of Eleven Thousand Four Hundred [75] and Nineteen Dollars and Seventy-six Cents (\$11,419.76) nor any portion thereof had at that time been nor was at that time so transferred by the said association or any of its officers to the said Assistant United States Treasurer at San Francisco, California, but that, on the contrary, the said sum last above mentioned still remained on deposit in said First National Bank of Juneau to the credit of the Treasurer of the United States, and at such time there remained on deposit with said association to the credit of the Treasurer of the United States and the various disbursing officers of the United States a sum greater than One Hundred and Fifty Thousand Dollars (\$150,000), to wit, the sum of Two Hundred and Twenty-five Thousand One Hundred and Sixty-one Dollars and Seven Cents (\$225,161.07), as he, the said C. M. Summers, President, and he, the said Stewart G. Holt, Cashier, as aforesaid, then and there when so making said entry well knew, and the said false entry was then and there so made as aforesaid with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association and certain per-

sons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [76]

COUNT TWENTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the

head of "Liabilities," the same being known and designated as Item No. 17 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits.33,219.14"

[77]

and which said entry so made as aforesaid then and there purporting to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Thirty-three Thousand Two Hundred and Nineteen Dollars and Fourteen Cents (\$33,219.14), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 28th day of April, A. D. 1909, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Sixty-nine Thousand Two Hundred and Nineteen Dollars, and Thirteen Cents (\$69,219.13), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby in-

tending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [78]

COUNT TWENTY-SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 9th day of May, A. D. 1910, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there willfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of Section 5211 of the

Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits. 49,251.42"

[79]

and which said entry was so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Forty-nine Thousand Two Hundred and Fifty-one Dollars and Forty-two Cents (\$49,251.42), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 29th day of March, A. D. 1910, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of One Hundred and Eleven Thousand Four Hundred and Sixty-eight Dollars and Ten Cents (\$111,468.10), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making

said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [80]

COUNT TWENTY-EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 15th day of July, A. D. 1910, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 30th day of June, A. D. 1910, which said

report was then and there made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits.45,120.83"

[81]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Forty-five Thousand One Hundred and Twenty Dollars and Eighty-three Cents (\$45,120.83), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 30th day of June, A. D. 1910, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Ninety-five Thousand and Ten Dollars and Thirty-seven Cents (\$95,010.37), he the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time

and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [82]

COUNT TWENTY-NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of November, A. D. 1910, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrongfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to

wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits.47,668.52"

[83]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Forty-seven Thousand Six Hundred and Sixty-eight Dollars and Fifty-two Cents (\$47,668.52), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 10th day of November, A. D. 1910, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of One Hundred and Nineteen Thousand Two Hundred and Sixty-three Dollars and Fifty-one

Cents (\$119,263.51), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [84]

COUNT THIRTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 8th day of April, A. D. 1911, in the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banking associations, did then and there wilfully, unlawfully, wrong-

fully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain day, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities," the same being known and designated as Item No. 16 of Liabilities in said report, which said entry was made as aforesaid in said report in the words and figures following, to wit:

"United States Deposits.....74,887.06"

[85]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of the United States Deposits then and there in the said First National Bank of Juneau, exclusive of the amount then and there on deposit to the credit of the various disbursing officers of the United States, was the sum of Seventy-four Thousand Eight Hundred and Eighty-seven Dollars and Six Cents (\$74,887.06), and no more;

And the Grand Jurors aforesaid further state that said entry so made as aforesaid was false, in this, to wit, that the amount of United States Deposits then and there in said bank at the close of business on the said 7th day of March, A. D. 1911, exclusive of the sums and amounts then and there to the credit of the various disbursing officers of the United States, was not in the sum last aforesaid, but in a

different and much greater sum, to wit, in the sum of One Hundred and Forty-five Thousand Six Hundred and Twenty-seven Dollars and Thirty-nine Cents (\$145,627.39), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [86]

COUNT THIRTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, at the town of Juneau in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under

and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.....21,306.65"

[87]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Twenty-one Thousand Three Hundred and Six Dollars and Sixty-five Cents (\$21,306.65), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there at the close of business on said 28th day of April, A. D. 1909, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much

smaller sum, to wit, in the sum of Two Thousand One Hundred and Ninety-two Dollars and Fifty-eight Cents (\$2,192.58), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [88]

COUNT THIRTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respect-

ing national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.....9,315.84"

[89]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Nine Thousand Three Hundred and Fifteen Dollars and Eighty-four Cents (\$9,315.84), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there at the close of business on said 29th day of March, A. D. 1910, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Two Hundred and

One Dollars and Seventy-seven Cents (\$201.77), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [90]

COUNT THIRTY-THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wil-

fully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.....9,470.97"

[91]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Nine Thousand Four Hundred and Seventy Dollars and Ninety-seven Cents (\$9,470.97), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there at the close of business on said 30th day of June, A. D. 1910, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Three Hundred and Fifty-six Dollars and Ninety Cents (\$356.90),

and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [92]

COUNT THIRTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently

make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.....28,074.73"

[93]

the same being known and designated at Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Twenty-eight Thousand and Seventy-four Dollars and Seventy-three Cents (\$28,074.73), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on the said 10th day of November, A. D. 1910, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Ten Thousand Seven Hundred and Sixty-two Dollars and Eleven Cents (\$10,762.11), and no more, he, the said

C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [94]

COUNT THIRTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently made, in a certain report of the condition of the affairs of

the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from State and Private Banks
and Bankers, Trust Companies
and Savings Banks.....38,329.25"

[95]

the same being known and designated as Item No. 12 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from State and Private Banks and Bankers, Trust Companies and Savings Banks to the said association was in the sum of Thirty-eight Thousand Three Hundred and Twenty-nine Dollars and Twenty-five Cents (\$38,329.25), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false in this, to wit, that the amount then and there at the close of business on the said 7th day of March, A. D. 1911, due said association from State and Private Banks and Bankers, Trust Companies and Savings Banks was not in the sum last aforesaid, but in a different and much smaller sum, to wit, in the sum of Nineteen Thousand Two Hundred and Fifteen Dollars and Eighteen Cents (\$19,215.18), and no more, he, the said C. M. Summers, President as aforesaid, and he, the

said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of the said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [96]

COUNT THIRTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close

of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents) 22,212.29"

[97]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Banks (not approved reserve agents) to the said First National Bank of Juneau was the sum of Twenty-two Thousand Two Hundred and Twelve Dollars and Twenty-nine Cents (\$22,212.29), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on said 29th day of March, A. D. 1910, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Twelve Thousand Two Hundred and Twelve Dollars and Twenty-nine Cents (\$12,212.29) and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making

the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [98]

COUNT THIRTY-SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and

there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).....19,605.06"

[99]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Banks (not approved reserve agents) to the said First National Bank of Juneau was the sum of Nineteen Thousand Six Hundred and Five Dollars and Six Cents (\$19,605.06, and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on the said 30th day of June, A. D. 1910, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Ten Thousand One Hundred and Ninety-three Dollars and Eighty-nine Cents (\$10,193.89), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false,

as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.
[100]

COUNT THIRTY-EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency

in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).....21,976.79"

[101]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Bank (not approved reserve agents) to the said First National Bank of Juneau was the sum of Twenty-one Thousand Nine Hundred and Seventy-six Dollars and Seventy-nine Cents (\$21,976.79), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on said 10th day of November, A. D. 1910, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Eleven Thousand Nine Hundred and Seventy-six Dollars and Seventy-nine Cents (\$11,976.79), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and design-

ing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [102]

COUNT THIRTY-NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United

States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

"Due from National Banks (not approved reserve agents).....14,962.57"

[103]

the same being known and designated as Item No. 11 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount due from National Banks (not approved reserve agents) to the said First National Bank of Juneau was the sum of Fourteen Thousand Nine Hundred and Sixty-two Dollars and Fifty-seven Cents (\$14,962.57), and not less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount then and there, at the close of business on said 7th day of March, A. D. 1911, due to said association from National Banks (not approved reserve agents) was not in the sum last aforesaid, but a different and much smaller sum, to wit, the sum of Four Thousand Nine Hundred and Sixty-two Dollars and Fifty-seven Cents (\$4,962.57), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to

deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.
[104]

COUNT FORTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Re-

sources" in said report, in words and figures as follows, to wit:

“Loans and Discounts (see
schedule)135,785.84”

[105]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Thirty-five Thousand Seven Hundred and Eighty-five Dollars and Eighty-four Cents (\$135,785.84), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 28th day of April, A. D. 1909, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Twenty-four Thousand and Eighty-five Dollars and Eighty-four Cents (\$124,085.84), and no more, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comp-

troller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States.
[106]

COUNT FORTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt, being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources"

in said report, in words and figures as follows, to wit:

“Loans and Discounts (see
schedule)145,743.88”

[107]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Forty-five Thousand Seven Hundred and Forty-three Dollars and Eighty-eight Cents (\$145,743.88), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 29th day of March, A. D. 1910, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Thirty-four Thousand Forty-three Dollars and Eighty-eight Cents (\$134,043.88), and no more, he the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by

said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.
[108]

COUNT FORTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Resources" in said report, in words and figures as follows, to wit:

“Loans and Discounts (see
schedule)..... 148,760.87”

[109]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Forty-eight Thousand Seven Hundred and Sixty Dollars and Eighty-seven Cents (\$148,760.87), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 30th day of June, A. D. 1910, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Thirty-seven Thousand and Sixty Dollars and Eighty-seven Cents (\$137,060.87), and no more, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to ex-

amine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [110]

COUNT FORTY-THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Re-

sources" in said report, in words and figures as follows, to wit:

"Loans and Discounts (see
schedule) 149,412.18"

[111]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Forty-nine Thousand Four Hundred and Twelve Dollars and Eighteen Cents (\$149,412.18), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 10th day of November, A. D. 1910, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Thirty-seven Thousand Seven Hundred and Twelve Dollars and Eighteen Cents (\$137,712.18), and no more, he the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said associa-

tion and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [112]

COUNT FORTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did then and there wilfully, wrongfully, unlawfully and fraudulently make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Re-

sources" in said report, in words and figures as follows, to wit:

"Loans and Discounts (see
schedule)..... ..159,340.88"

[113]

the same being known and designated as Item No. 1 of Resources in said report, and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the amount of Loans and Discounts of the said First National Bank of Juneau was in the sum of One Hundred and Fifty-nine Thousand Three Hundred and Forty Dollars and Eighty-eight Cents (\$159,340.88), and no less;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this to wit, that the amount of Loans and Discounts of the said First National Bank of Juneau was not then and there, at the close of business on said 7th day of March, A. D. 1911, of the sum last aforesaid, but a different and much smaller sum, to wit, the sum of One Hundred and Forty-seven Thousand Six Hundred and Forty Dollars and Eighty-eight Cents (\$147,640.88), and no more, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comp-

troller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [114]

COUNT FORTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 19th day of May, A. D. 1909, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 28th day of April, A. D. 1909, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit: [115]

Name of Officers and Directors.	Official Title.	Liability			No. of Shares Stock Owned.
		Liability (Individual or Firm) as Payers.	(Individual or Firm) as Indorser or Guarantors.	Checks and Over-drafts. Cash Items.	
C. M. Summers,	President.	7,185.	250.	2,723.89	33

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Nine Thousand Nine Hundred and Eight Dollars and Eighty-nine Cents (\$9,908.89), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 28th day of April, A. D. 1909, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Thirty-one Thousand Four Hundred and Eight Dollars and Eighty-nine Cents (\$31,408.89), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and

any agent appointed by said Comptroller of the Currency to examine the affairs of the said association, contrary to the form of the statutes in such case made and approved, and against the peace and dignity of the United States. [116]

COUNT FORTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 9th day of May, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 29th day of March, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit: [117]

Name of Officers and Directors.	Official Title.	Liability (Individual or Firm) as Payers.	Liability (Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items.	Over-drafts.	No. of Shares Stock Owned.
C. M. Summers,	President.	7,185.	1,450.		3,731.20	33

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Ten Thousand Nine Hundred and Sixteen Dollars and Twenty Cents (\$10,916.20), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 29th day of March, A. D. 1910, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Forty-two Thousand Seven Hundred and Forty-six Dollars and Forty Cents (\$42,746.40), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency

and any agent appointed by said Comptroller of the Currency to examine the affairs of the said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [118]

COUNT FORTY-SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers, and the said Stewart G. Holt, heretofore, to wit, on the 15th day of July, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 30th day of June, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit: [119]

Name of Officers and Directors.	Official Title.	Liability		Checks and Cash Items.	Over-drafts.	No. of Shares Stock Owned.
		(Individual or Firm) as Payers.	(Individual or Firm) as Indorser or Guarantors.			
C. M. Summers,	President.	7,185.	1,450.		4,546.73	33

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Eleven Thousand Seven Hundred and Thirty-one Dollars and Seventy-three Cents (\$11,731.73), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 30th day of June, A. D. 1910, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Forty-five Thousand One Hundred and Eighty-nine Dollars and Twenty-eight Cents (\$45,189.28), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to ex-

amine the affairs of the said association, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [120]

COUNT FORTY-EIGHT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit:

Name of Officers and Directors.	Official Title.	Liability			No. of Shares Stock Owned.
		Liability (Individual or Firm) as Payers.	(Individual or Firm) as Indorser or Guarantors.	Checks and Cash Items. Over-drafts.	
C. M. Summers,	President.	8,935.	250.	6,133.09	33

[121]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Fifteen Thousand and Sixty-eight Dollars and Nine Cents (\$15,068.09), and no more, exclusive of his liability as indorser or guarantor;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 10th day of November, A. D. 1910, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Fifty-two Thousand and Twenty-five Dollars and Sixty-four Cents (\$52,025.64), and not less, exclusive of his liability as indorser and guarantor, he, the said C. M. Summers, President, as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent ap-

pointed by said Comptroller of the Currency to examine the affairs of the said association; contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States. [122]

COUNT FORTY-NINE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt, heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Liabilities of Officers and Directors," in said report, in words and figures following, to wit:

Name of Officers and Directors.	Official Title.	Liability			No. of Shares Stock Owned.
		Liability (Individual or Firm) as Payers.	(Individual or Firm) as Indorser or Guarantors.	Checks and Over- Cash Items. drafts.	
C. M. Summers, President		7,185.		2,485.37	23

[123]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the individual liability and indebtedness of the said C. M. Summers to the said association was then and there the sum of Nine Thousand Six Hundred and Seventy Dollars and Thirty-seven Cents (\$9,670.37), and no more;

And the Grand Jurors aforesaid further say that said entry so made, as aforesaid, was false, in this, to wit, that the amount then, at the close of business on the said 7th day of March, A. D. 1911, owing from the said C. M. Summers personally, and his indebtedness then and there, to said association, was not in the sum last aforesaid, but a different and much larger sum, to wit, the sum of Fifty-two Thousand Four Hundred and Seventy-seven Dollars and Ninety-two Cents (\$52,477.92), and not less, he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of the said associa-

tion, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [124]

COUNT FIFTY.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 19th day of November, A. D. 1910, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 10th day of November, A. D. 1910, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of Section 5211 of the Revised Statutes of the United States, a certain false entry in said report, known and designated as Item G, in words and figures as follows, to wit:

“G. Bad debts, as defined in Section

5204, Revised Statutes.....\$7,447.”

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that of the Debts due to said association in the form of Loans and Discounts and included in Item No. 1 of Resources in said report, on which interest was at that time past due and unpaid for the period of six months and which were not well secured and then in the process of collection, amounted to Seven Thousand Four Hundred and Forty-seven Dollars (\$7,447), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the said amount of Bad Debts as defined in section 5204 of the said Revised Statutes, then and there, at the close of business on the said 10th day of November, A. D. 1910, owing to said association in the form of Loans and Discounts and included in the Item No. 1 of Resources in said report, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Thirty-four Thousand Seven Hundred and Eighty-eight Dollars and Fifty Cents (\$34,788.50), and no less, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller

of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [126]

COUNT FIFTY-ONE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then and there existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, then and there wilfully, wrongfully, unlawfully and fraudulently did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry in said report, known

and designated as Item G, in words and figures as follows, to wit:

“G. Bad debts, as defined in Section 5204, Revised Statutes..\$7,317.50”

[127]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that of the Debts due to said association in the form of Loans and Discounts and included in Item No. 1 of Resources in said report on which interest was at that time past due and unpaid for the period of six months and which were not well secured and then in the process of collection, amounted to Seven Thousand Three Hundred and Seventeen Dollars and Fifty Cents (\$7,317.50), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that the said amount of Bad Debts as defined in section 5204 of the said Revised Statutes, then and there, at the close of business on the said 7th day of March, A. D. 1911, owing to said association in the form of Loans and Discounts and included in the Item No. 1 of Resources in said report, was not in the sum last aforesaid, but in a different and much greater sum, to wit, in the sum of Thirty-four Thousand Seven Hundred and Eighty-eight Dollars and Fifty Cents (\$34,788.50), and no less, he, the said C. M. Summers, President aforesaid, and he, the said Stewart G. Holt, Cashier aforesaid, then and there at the time and place of so making the said false entry in said report, as aforesaid, well knowing the

said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [128]

COUNT FIFTY-TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 1st day of December, A. D. 1909, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, wilfully, wrongfully, unlawfully and fraudulently then and there did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 16th day of November, A. D. 1909, which said report was then and there made to the Comptroller of the Currency

in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Loans exceeding the limit prescribed by Section 5200 of the Revised Statutes, including Loans which exceed this limit due from State and Private Banks and Bankers, Trust Companies and Savings Banks, Overdraft, if any, to be classed with Loans," in said report, in words and figures as follows, to wit:

Name of Borrower.

Enter Full Amount
of Loan.

Eagle River Mining Co.

7,449.39

Temporary Overdraft Acc't.

Since reduced under limit.

[129]

and which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that the only loan of said association exceeding the limit prescribed by Section 5200 of the Revised Statutes of the United States, was a loan by way of overdraft to Eagle River Mining Company of the sum of Seven Thousand Four Hundred and Forty-nine Dollars and Thirty-nine Cents (\$7,449.39), and no more;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that at the close of business on the said 16th day of November, A. D. 1909, there was owing to the said association, in the form of loans, from the Ketchikan Power Company, a corporation, the sum of Twenty-eight Thousand Dollars (\$28,000), and no less, in addition to the amount set out in the said false item as owing said association from the said Eagle River

Mining Company, the amount of the capital stock of the said First National Bank of Juneau actually paid in at the various times above mentioned not being in excess of the sum of Fifty Thousand Dollars (\$50,000), he, the said C. M. Summers, President as aforesaid, and he, the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [130]

COUNT FIFTY-THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 8th day of April, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then ex-

isting and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, wilfully, wrongfully, unlawfully and fraudulently then and there did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the 7th day of March, A. D. 1911, which said report was then and there made to the Comptroller of the Currency in due form in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain false entry under the head of "Loans exceeding the limit prescribed by section 5200 of the Revised Statutes, including Loans which exceed this limit due from State and Private Banks and Bankers, Trust Companies and Savings Banks, Overdraft, if any, to be classed with Loans," in said report, in words and figures as follows, to wit:

Name of Borrower.

Enter Full Amount
of Loan.

NONE.

[131]

which said entry so made as aforesaid then and there purported to show and did in substance and effect declare that there was, at the close of business on the said 7th day of March, A. D. 1911, not owing to said association from any person, company, copartnership or corporation, by way of loans, any sum in excess of the limits prescribed by section 5200 of the Revised Statutes of the United States;

And the Grand Jurors further say that said entry so made as aforesaid was false, in this, to wit, that at the time aforementioned, to wit, at the close of

business on the said 7th day of March, A. D. 1911, there was due and owing to said association, in the form of loans, from the Ketchikan Power Company, a corporation, the sum of Twenty-seven Thousand Dollars (\$27,000), and from the Cordova Power Company, a corporation, the sum of Twenty Thousand Dollars (\$20,000), and no less, the amount of the capital stock of the said First National Bank of Juneau actually paid in at the various times above mentioned not being in excess of the sum of Fifty Thousand Dollars (\$50,000), he the said C. M. Summers, President as aforesaid, and he the said Stewart G. Holt, Cashier as aforesaid, then and there at the time and place of so making said false entry in said report, as aforesaid, well knowing said entry to be then and there false, as aforesaid, and thereby intending and designing to injure and defraud the said association and certain persons to the Grand Jury unknown, and to deceive any officer of said association and the Comptroller of the Currency and any agent appointed by said Comptroller of the Currency to examine the affairs of said association, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [132]

COUNT FIFTY-FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit, on the 6th day of July, A. D. 1911, at the town of Juneau, in the Division and District aforesaid, and within the jurisdiction of this court, the said C. M. Sum-

mers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, did, then and there, wilfully, wrongfully, unlawfully and fraudulently, without the knowledge and consent of said association or its Board of Directors, and with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud the said association, abstract from said association and convert to their own use, and to the use of each of them, moneys, funds and credits of the property of said association, of the aggregate amount and actual value of Thirty-three Thousand One Hundred and Twenty-one Dollars and Eleven Cents (\$33,121.11), to the damage and injury of said association in the sum of Thirty-three Thousand One Hundred and Twenty-one Dollars and Eleven Cents (\$33,121.11), a further description of which moneys, funds and credits so abstracted being to this Grand Jury unknown, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [133]

COUNT FIFTY-FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers and the said Stewart G. Holt heretofore, to wit,

on the 15th day of March, A. D. 1910, in said District and Division, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau was theretofore duly established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, and the said C. M. Summers, President aforesaid, and the said Stewart G. Holt, Cashier aforesaid, so being such President and Cashier respectively, and as such in possession, charge and control of the moneys, funds and credits and properties of said association, then and there, with the intent to injure and defraud the said banking association of the sum of Six Thousand Dollars (\$6,000) lawful money of the United States, did wilfully, wrongfully, unlawfully and fraudulently misapply moneys, funds and credits of said association in the sum and to the amount and value of Six Thousand Dollars (\$6,000), in manner and form as follows, to wit:

That theretofore, to wit, on the 5th day of March, A. D. 1910, the Farmers' and Merchants' Bank of Wenatchee, the same being a banking institution then doing business as [134] such at Wenatchee, in the State of Washington, at the instance and request of said C. M. Summers and by his procurement, made and drew its draft on the said First National Bank of Juneau in the sum of Six Thousand Dollars (\$6,000),

for the payment of an indebtedness then owing by said C. M. Summers, personally, to said Farmers and Merchants' Bank of Wenatchee, which draft was thereafter and on or about the 15th day of March, A. D. 1910, by the said C. M. Summers and the said Stewart G. Holt, acting as President and Cashier aforesaid, respectively, wilfully, wrongfully, unlawfully and fraudulently, and without the authority from or the consent of the said association or its Board of Directors, and, with the intent aforesaid, paid and caused to be paid out of the funds and credits of the said First National Bank of Juneau then in the Bank of California National Association of Seattle, a corporation then existing and doing business as a banking association in the City of Seattle, Washington, a further description of which moneys, funds and credits so wrongfully paid, as aforesaid, being to the Grand Jury unknown, the said sum so paid and caused to be paid out of the said funds and credits of the said First National Bank of Juneau being then and there the personal obligation of him, the said C. M. Summers as aforesaid, and in no wise [135] an obligation or indebtedness of the said First National Bank of Juneau, as he, the said C. M. Summers and he, the said Stewart G. Holt then and there well knew, and was so paid and caused to be paid for the personal benefit and advantage and in discharge of the personal obligation of him, the said C. M. Summers, and not for the benefit or to the credit or advantage of said First National Bank of Juneau, but to the injury of said First National Bank of Juneau and to its loss in the sum of Six Thousand

Dollars (\$6,000) lawful money of the United States, said payment being so made and caused to be made with the intent aforesaid on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, he, the said C. M. Summers being then and there, prior to and at the time of the said payment of said sum of Six Thousand Dollars (\$6,000) of the funds and credits of said association, insolvent and indebted to the said association in the sum of more than Thirty Thousand Dollars (\$30,000), and the capital stock of said association being then and there not more than Fifty Thousand Dollars (\$50,000), all of which the said C. M. Summers and the said Stewart G. Holt then and there well knew, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [136]

COUNT FIFTY-SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. M. Summers, and the said Stewart G. Holt heretofore, to wit, on the 13th day of May, A. D. 1910, in said District and Division, and within the jurisdiction of this court, the said C. M. Summers being then and there the President, and the said Stewart G. Holt being then and there the Cashier, of a certain national banking association known and designated as First National Bank of Juneau, and which said First National Bank of Juneau, was theretofore duly established and then existing and doing business as a national banking association under and by virtue of the laws of the United States respecting national banks, and the said C. M. Summers, President aforesaid,

and the said Stewart G. Holt, Cashier aforesaid, so being such President and Cashier respectively, and as such in possession, charge and control of the moneys, funds, credits and properties of said association, then and there, with the intent to injure and defraud said banking association of the sum of Twelve Hundred Dollars (\$1,200), lawful money of the United States, did wilfully, wrongfully, unlawfully and fraudulently misapply funds and credits of said association in the sum of and to the amount and value of Twelve Hundred Dollars (\$1,200) in manner and form as follows, to wit: [137]

That theretofore, on the 5th day of May, A. D. 1910, the said C. M. Summers was personally indebted to the Canadian Lang Stove Company, a corporation, in the sum of Twelve Hundred Dollars (\$1,200), and that on said date the said Canadian Lang Stove Company, through Wythe Denby, its agent, made its draft upon the said C. M. Summers, in words and figures as follows, to wit:

\$1200.00

Seattle, May 5, 1910.

At sight pay to the order of

THE CANADIAN BANK OF COMMERCE

Twelve Hundred and no/100.....Dollars.

Value received and charge to the acct. of 40%
coll. on

CANADIAN LANG STOVE CO. STOCK.

WYTHE DENBY.

To C. M. Summers,

1st National Bank,

Juneau.

which said draft being then and there for the personal

indebtedness and obligation of said C. M. Summers, as aforesaid, as the said C. M. Summers and the said Stewart G. Holt, then and there well knew, was subsequently, to wit, on the 13th day of May, A. D. 1910, by the said C. M. Summers and the said Stewart G. Holt, acting as said President and Cashier aforesaid respectively, caused to be paid out of the funds and credits of the said First National Bank of Juneau, by then and there as such President and Cashier as aforesaid causing the said First National Bank of Juneau to issue its draft, known and designated as No. 9846, on the National Bank of Commerce at Seattle, in the State of Washington, for the sum of Twelve Hundred Dollars (\$1,200) in favor of the said Canadian Bank of Commerce in payment of said draft of the said Canadian Lang Stove Company above set out which draft [138] of the said First National Bank of Juneau upon the National Bank of Commerce at Seattle was subsequently and on or about the 18th day of May, A. D. 1910, honored and fully paid by the said National Bank of Commerce at Seattle, Washington, and charged to the said First National Bank of Juneau, said payment of Twelve Hundred Dollars (\$1,200) being so made as aforesaid solely for the benefit and advantage of said C. M. Summers, personally, and in no manner for the benefit or advantage of the said First National Bank of Juneau, and was so made and caused to be made by the said C. M. Summers and the said Stewart G. Holt, as such President and Cashier as aforesaid, wilfully, wrongfully, unlawfully and fraudulently, and without the authority from or consent of the said

association, or its Board of Directors, and with the intent then and there on the part of him, the said C. M. Summers, and him, the said Stewart G. Holt, to injure and defraud said association, as aforesaid, to the injury of said association and to its loss in the sum of Twelve Hundred Dollars (\$1,200), lawful money of the United States, the said C. M. Summers being then and there, prior to and at the time of the said payment of said sum of Twelve Hundred Dollars (\$1,200), in manner and form above set out, insolvent and indebted to the said association in the sum of more than Thirty Thousand Dollars (\$30,000), and the capital stock of said association being then and there not more than Fifty Thousand Dollars (\$50,000), all of which said C. M. Summers and said Stewart G. Holt then and there well knew, contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the United States. [139]

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That C. M. Summers and Stewart G. Holt, did then and there commit the crimes of making false entries, and of misapplying funds, and of abstracting funds, in violation of the provisions of section 5209 of the Revised Statutes of the United States, in manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against

the peace and dignity of the United States of America.

JOHN RUSTGARD,
United States Attorney. [140]

WITNESSES:

(Examined Before the Grand Jury.)

F. M. BAILEY.

JOHN KENNEDY.

GEORGE KNOX.

PAUL P. FLOYD.

W. A. THOMPSON.

L. P. SHACKLEFORD.

HENRY SHATTUCK. [141]

[142]

[Endorsed]: Form No. 195. No. 821-B. United States District Court, District of Alaska, First Division. The United States of America vs. C. M. Summers and Stewart G. Holt. Indictment. Violation of Sec. 5209, R. S., Making False Entries, Misapplying Funds, and Abstracting Funds. A True Bill. J. Latimer Gray, Foreman. Filed this 5th Day of January, A. D. 1912. E. W. Pettit, Clerk. John Rustgard, U. S. Atty. Presented by J. Latimer Gray, Foreman of the Grand Jury, in the Presence of the Grand Jury, in Open Court, and Filed in Open Court With the Clerk of the District Court, All on this 5th day of January, 1912. E. W. Pettit, Clerk. [143]

In the District Court for the District of Alaska, Division No. 1.

No. 821-B.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and STEWART G. HOLT,
Defendants.

Bench Warrant.

IN THE NAME OF THE UNITED STATES OF
AMERICA.

To the United States Marshal for the District of
Alaska, Division No. 1, or any Deputy Thereof,
Greeting:

An indictment having been found on the 5th day
of January, 1912, in the District Court for the Dis-
trict of Alaska, Division No. 1, charging defendants
with the crime of violation of Sec. 5209, R. S.:

This is to command you forthwith to arrest the
defendants, C. M. Summers and Stewart G. Holt, and
bring them before such Court, to answer the said
indictment, or if the Court have adjourned for the
term that you detain them in your custody.

By order of the Court.

WITNESS my hand and the seal of said Court,
affixed at Juneau, this 5th day of January, 1912.

[Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,
Division No. 1.

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within bench warrant on the 5th day of Jan., A. D. 1912, and thereafter executed the same by arresting the within named C. M. Summers and S. G. Holt, at Juneau, in said District of Alaska, on the 5 day of Jan., A. D. 1912, and that I now hold the said C. M. Summers and S. G. Holt [144] in my custody by virtue of said warrant.

Dated the 5th day of Jan., A. D. 1912.

H. L. FAULKNER,
U. S. Marshal.

By _____,
Deputy.

[Endorsed]: No. 821-B. In the District Court for the District of Alaska, Division No. 1. The United States of America, Plaintiff, vs. C. M. Summers and Stewart G. Holt, Defendants. Bench Warrant. The Defendant to be Admitted to Bail in the Sum of \$_____. _____, Clerk. Filed Jan. 5, 1912. E. W. Pettit, Clerk. [145]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 821-B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Arraignment.

Now, on this day, came the United States Attorney, John Rustgard; came also the defendants in the custody of the United States Marshal, and being represented by their attorneys, Messrs. L. P. Shackleford and Wm. Bayless; and upon motion of L. P. Shackleford, the United States Attorney in open court, consenting thereto, the reading of the indictment herein is omitted, and defendants were each served in open court with a copy of the indictment; and defendants being each asked by the Court if they are indicted by their true names, and each answering that he is, defendants are given until 10 o'clock A. M. Monday, January 8, 1912, in which to enter their pleas herein; and bail for appearance is fixed in the amount of Five Thousand Dollars for each defendant.

Dated Friday, January 5, 1912.

THOMAS R. LYONS,

Judge.

(Criminal Journal, p. 17.) [146]

*In the United States District Court for the District
of Alaska, Division No. One, at Juneau.*

THE UNITED STATES OF AMERICA,

vs.

C. M. SUMMERS and S. G. HOLT.

Bail Bond.

An indictment having been found on the 5th day of January, 1912, in the District Court of the United States for the District of Alaska, Division No. One, at Juneau, against C. M. Summers and S. G. Holt, charging them with the crime of violating Sec. 5209—Revised Statutes of U. S.—and the said C. M. Summers having been duly admitted to bail in the sum of \$5,000.00 (Five Thousand Dollars):

We, B. L. Thane, by occupation a mining engineer, and Henry Shattuck, by occupation a merchant, both residents of Juneau, Alaska, hereby undertake that the above-named C. M. Summers shall appear and answer the indictment above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and if convicted shall appear for judgment and render himself in execution thereof; or if he fail to perform either of those conditions, that we will pay to the United States the sum of Five Thousand (\$5,000) Dollars.

Dated at Juneau, Alaska, January 5th, 1912.

Taken and acknowledged before me the day and year above written.

C. M. SUMMERS. [Seal]

H. SHATTUCK. [Seal]

B. L. THANE. [Seal]

United States of America,

District of Alaska,

Town of Juneau,—ss.

B. L. Thane and Henry Shattuck, being first [147] duly sworn, each for himself and not one for the other says: I am a resident and householder within the District of Alaska, and not counsellor or attorney, nor marshal, clerk or other officer of any court. I am worth the sum of \$5,000.00 (Five Thousand Dollars), exclusive of property exempt from execution, and over and above all just debts and liabilities.

H. SHATTUCK.

B. L. THANE.

Subscribed and sworn to before me this 5th day of January, A. D. 1912.

[Notarial Seal]

W. S. BAYLESS,

Notary Public for Alaska.

The above undertaking is allowed this 5th day of January, A. D. 1912.

THOMAS R. LYONS,

Judge of the District Court for the District of Alaska, Division No. One, at Juneau.

[Endorsed]: Original. No. 821-B. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M.

Summers and S. G. Holt, Defendants. Bail Bond of C. M. Summers. Shackleford & Bayless, Attorneys for Defts. Office, Juneau, Alaska. Filed Jan. 5, 1912. E. W. Pettit, Clerk. By _____, Deputy. [148]

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Demurrer.

Comes now one of the defendants, C. M. Summers, and demurs to the indictment on file herein upon the following grounds:

That it appear upon the face thereof

First: That the Grand Jury by which the said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within the District.

Second: For the reason that it does not substantially conform to the requirements of Chapter 7, Title II, of the Act of Congress approved March 3d, 1899, providing for a Code of Criminal Procedure for the District of Alaska, and particularly to Section 43 of Title II of said Act.

Third: That more than one crime is charged in the indictment.

Fourth: That the facts stated in the said indictment does not constitute a crime.

And comes now the said defendant, C. M. Sum-

mers, and further demurs separately to each and every count in the said indictment from Count 1 to Count 56, inclusive, upon each and every one of the grounds above stated.

LEWIS P. SHACKLEFORD,
Attorney for Defendant.

Filed Jan. 8, 1912. E. W. Pettit, Clerk. By
_____, Deputy. [149]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821-B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order Overruling Demurrer.

Now, on this day came on regularly for hearing the demurrer of defendant C. M. Summers to the indictment herein, which demurrer was submitted without argument; and the Court being fully advised in the premises, overrules said demurrer, to which order and ruling of the Court defendant C. M. Summers, by counsel, Messrs. Shackelford & Bayless, excepts and exception is allowed.

Dated Monday, January 8, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 24.) [150]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 821-B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Plea of C. M. Summers.

Now, on this day, comes the United States Attorney, John Rustgard; comes also the defendant, C. M. Summers, in person and by his attorneys, Messrs. Shackelford & Bayless, and said defendant C. M. Summers having on a prior day of this term been duly arraigned, is now asked by the Court if he, said C. M. Summers, is guilty or not guilty of the crime charged against him in the indictment herein, namely, that of violation of section 5209, Revised Statutes of the United States; to which defendant C. M. Summers says that he is not guilty, and therefore puts himself upon the country, and the United States Attorney, for and on behalf of the Government, doth the same, and this cause is continued awaiting trial.

Dated Monday, January 8, 1912.

THOMAS R. LYONS,

Judge.

(Criminal Journal, p. 24.) [151]

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA.

vs.

C. M. SUMMERS and STEWART G. HOLT.

Motion to Change Place of Trial.

Comes now C. M. Summers, one of the defendants in the above-entitled cause, and moves that the place of trial of this defendant be changed, and that the defendant be tried at the contemplated May term of this court at Ketchikan, Alaska. This motion is based upon the records and files herein and upon the accompanying affidavits.

LEWIS P. SHACKLEFORD,
Attorney for Defendant. [152]

**[Affidavit of C. M. Summers in Support of Motion
to Change Place of Trial.]**

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

C. M. Summers, being first duly sworn, on oath deposes and says: I am one of the defendants in the above-entitled action; that I cannot safely proceed to the trial of this action until after the investigation of the books of a number of banks corresponding with the

First National Bank, and until full and complete advice and information is received on all of the matters charged in the indictment herein; that I was present in Juneau for a number of weeks before and after my retirement from the First National Bank on or about the fifth day of July, 1911; that I am fully advised as to the state of feeling and opinion in this community, and that from such advice I am satisfied that the merits or alleged merits of this cause have been fully discussed by nearly all persons eligible to jury service north of Wrangell Narrows, and that a fair, impartial and unbiased jury cannot be obtained in the first Division of Alaska, north of Wrangell Narrows.

C. M. SUMMERS.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal]

W. S. BAYLESS,

Notary Public for Alaska. [153]

[Affidavit of L. P. Shackleford in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

L. P. Shackleford, being first duly sworn, on oath deposes and says:

I am one of the counsel for the defendant C. M. Summers in the above-entitled cause; that I have hastily read over the indictment of one hundred and

forty pages filed herein on the fifth day of January, 1912; that about the sixth day of July, 1911, I was called into consultation with reference to a change in the officers of the First National Bank, and that from that time until the latter part of August, 1911, I was from day to day engaged in matters concerning the reorganization of said bank and concerning the connection of the defendant C. M. Summers with the said bank; that I had occasion to discuss the same with a great many people in Juneau and in this part of Southeastern Alaska during said period and since; that I have made careful investigation of the state of public mind north of Wrangell Narrows with reference to the question as to whether jurors could be procured in the First Division of Alaska, north of Wrangell Narrows, who had not formed and expressed a firm conviction as to the guilt or innocence of the defendant here; that the circumstances or alleged circumstances connected with the change in the officers of the First National Bank in Juneau, Alaska, has been the most discussed topic in Southeastern Alaska since the sixth of July, 1911; that from the investigation made by me and from the information received by numerous and reliable persons in [154] the First Division of Alaska, it appears that there are practically no persons eligible as jurors north of Wrangell Narrows, in Southeastern Alaska, who have not met and discussed the question of guilt or innocence of the defendant and expressed a decided opinion thereon; that the matter has been discussed freely in public print in the vicinity of Juneau, Haines, Skagway and Douglas, Alaska; that the defendant is a man of wide

acquaintance in the District, and a man of prominence in the community, and for a number of years past many transactions with which he was identified have been discussed in the vicinity of Juneau, Alaska, publicly and with considerable acrimony; that for the past four years a number of people in this portion of the First Division of Alaska have not only spent their time in discussing the merits of this case but in circulating and discussing adverse reports of the defendant; and that affiant says that it would be impossible for the defendant to secure a fair and impartial trial by a jury in this portion of the First Division of the District of Alaska.

Affiant further says that it will take three or four months to prepare for the trial under the said indictment and to secure the necessary data and information with which to be informed and meet the allegations in the indictment, but that in his opinion the defendant could be prepared and ready for trial at the proposed May term of this Court at Ketchikan, Alaska.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal]

W. S. BAYLESS,

Notary Public for Alaska.

[Endorsed]: Filed Jan. 8, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [155]

**[Affidavit of B. L. Thane in Support of Motion to
Change Place of Trial.]**

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT

United States of America,
District of Alaska,—ss.

B. L. Thane, being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregularities in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows, and find that public sentiment thereon and private opinions of members of the community, as to the guilt or innocence of the defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have be-

come fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [156] thereon; that in my opinion a fair, impartial and unbiased jury could not be secured from eligible jurors north of Wrangell Narrows.

B. L. THANE.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal]

W. S. BAYLESS,
Notary Public for Alaska.

[Endorsed]: Original No. —. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and S. G. Holt, Defendants. Affidavit. Lewis P. Shackelford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ———, Deputy. [157]

**[Affidavit of J. P. Olds in Support of Motion to
Change Place of Trial.]**

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,
District of Alaska,—ss.

J. P. Olds being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the chargès of irregularities in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action, have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows and find that public sentiment thereon and private opinions of members of the community as to the guilt or innocence of the defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have become fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [158] thereon; that in my opinion a fair, impartial and unbiased jury could not

be secured from eligible jurors north of Wrangell Narrows.

J. P. OLDS.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal]

W. S. BAYLESS,

Notary Public for Alaska.

[Endorsed]: Original. No. —. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and H. G. Holt, Defendants. Affidavit. Lewis P. Shackelford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ———, Deputy. [159]

[Affidavit of H. J. Raymond in Support of Motion to Change Place of Trial.]

District Court for the District of Alaska, Division Number One, at Juneau.

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,

District of Alaska,—ss.

H. J. Raymond, being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregulari-

ties in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action, have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows and find that public sentiment thereon and private opinions of members of the community as to the guilt or innocence of the defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have become fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [160] thereon; that in my opinion a fair, impartial and unbiased jury could not be secured from eligible jurors north of Wrangell Narrows.

H. J. RAYMOND.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

[Notarial Seal]

W. S. BAYLESS,

Notary Public for Alaska.

[Endorsed]: Original. No. —. In the District Court for the District of Alaska, Division No.

1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and H. G. Holt. Affidavit. Lewis P Shackleford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ———, Deputy. [161]

**[Affidavit of J. R. Whipple in Support of Motion
to Change Place of Trial.]**

*District Court for the District of Alaska, Division
Number One, at Juneau.*

THE UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

United States of America,
District of Alaska,—ss.

J. R. Whipple, being first duly sworn, on oath deposes and says:

That I am a resident of the District of Alaska, residing at Juneau, Alaska; that the change in the management of the First National Bank of Juneau, Alaska, in July, 1911, and the charges of irregularities in the conduct of said bank with reference particularly to the defendant, C. M. Summers, in the above-entitled action, have been a matter of public and private discussion in Southeastern Alaska ever since said time and up until the present time; that I have talked with a number of people in that portion of the First Division of the District of Alaska north of Wrangell Narrows and find that public sentiment thereon and private opinions of members of the community as to the guilt or innocence of the

defendant have become so fixed that practically no person qualified for jury duty in that portion of the First Division north of Wrangell Narrows could fairly serve upon a jury in the trial of the said defendant, for the reason that their opinions have become fixed with reference to the matters covered by the indictment on file herein; that the topic as to the guilt or innocence of the defendant has been the most discussed topic in this portion of Alaska since the sixth of July, 1911, and that I do not know of any persons who have not refrained from discussing said topic and announcing an opinion [162] thereon; that in my opinion a fair, impartial and unbiased jury could not be secured from eligible jurors north of Wrangell Narrows.

J. R. WHIPPLE.

Subscribed and sworn to before me this 8th day of January, A. D. 1912.

LEWIS P. SHACKLEFORD,

Notary Public for Alaska.

[Endorsed]: Original. No. —. In the District Court for the District of Alaska, Division No. 1, at Juneau. U. S. of America, Plaintiff, vs. C. M. Summers and S. G. Holt, Defendants. Affidavit. Lewis P. Shackelford, Attorney for Defts. Office: Juneau, Alaska. Filed Jan. 8, 1912. E. W. Pettit, Clerk. By ———, Deputy. [163]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821-B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [in the Matter of Setting for Trial].

Now, on this day, this cause came on to be heard upon the motion of defendant C. M. Summers to change the place of trial of said C. M. Summers to Ketchikan, Alaska, at the contemplated May, 1912, Term, at that place; and after argument had by the United States Attorney, John Rustgard, and Messrs. Shackleford and Bayless, counsel for defendant C. M. Summers, the Court being fully advised in the premises, grants said motion, and this case is continued until to-morrow, January 9, 1912, to determine time for setting for trial.

Dated Monday, January 8, 1912.

THOMAS R. LYONS,

Judge.

(Criminal Journal, p. 25.) [164]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821-B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [Setting Cause for Trial].

The motion for change of venue of defendant C. M. Summers herein having heretofore been granted and the matter of setting time for trial of said C. M. Summers continued to this day, the Court being fully advised in the premises continues the time for setting for trial as to defendant C. M. Summers to the first day of an anticipated Special May, 1912, Term of this court, to be held at Ketchikan, Alaska.

Dated Tuesday, January 9, 1912.

THOMAS R. LYONS,

Judge.

(Criminal Journal, p. 29.) [165]

*In the United States District Court for the District
of Alaska, Division Number One.*

No. 821-B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [Re Subpoena to P. P. Floyd].

WHEREAS the following stipulation has been entered into in the above-entitled cause by and between John Rustgard, as attorney for plaintiff, and Lewis P. Shackelford, as attorney for the defendants, to wit:

“Whereas one of the employees of the United States Cable Office at Juneau has been subpoenaed as a witness on behalf of the Govern-

ment to appear at Ketchikan on the 6th day of May, 1912, and there produce all the telegrams sent by the First National Bank of Juneau to the Anglo-London Paris National Bank of San Francisco, California, during the last four years and up to the first day of July, 1911, and

"Whereas none of the employees of said cable office can appear at Ketchikan at said time without great inconvenience and without irreparable loss to themselves,

"NOW, THEREFORE, for the purpose of rendering it unnecessary for either employee of said office to appear at said time and place in response to said subpoena, it is hereby stipulated and agreed by and between the parties to the above-entitled cause, by and through John Rustgard, Esq., acting for and on behalf of the plaintiff, and by and through Louis P. Shackelford, acting for and on behalf of defendants, and with their consent, that the hereto attached telegrams numbered from No. 1 to No. 38, inclusive, are original records on file in the United States Signal Service Office, otherwise known as the Cable Office, at Juneau, Alaska, and that they have been on file in said office since the date of each dispatch respectively; that said dispatches were received at said Cable Office at the date indicated upon said dispatch; that each was so received for transmission by telegraph to the addressee at San Francisco, California; that the pencil writings on each of said telegrams or dispatches are marks and nota-

tions made by the employee of the Cable Office or Signal Service Office at Juneau who received and transmitted such dispatch; that they are all the telegrams sent by First National Bank of Juneau to the Anglo-London Paris National Bank of San Francisco sent during period covered by said dispatches; that said dispatches were filed for transmission and paid for by and on behalf of the First National Bank of Juneau, Alaska, and that the facts above stated will be admitted by the defendants upon the trial in the above-entitled cause.

"IT IS FURTHER AGREED that the above stipulation, together with the attached dispatches, may be delivered [166] by Paul Floyd, the person in charge of the United States Signal Service Office at Juneau to R. E. Robertson, Private Secretary to the Honorable Thomas R. Lyons, and may be by him safely kept and upon the trial of the said cause at Ketchikan produced and offered in evidence together with this stipulation.

"Dated this 6th day of April, A. D. 1912, at Juneau, Alaska."

And WHEREAS the office in charge of the military cable in Alaska and the files referred to in the said stipulation requires that before the said files are delivered to R. E. Robertson pursuant to said stipulation an order be issued by this Court directing that the same may be done,

NOW, THEN, IT IS THEREFORE ORDERED upon motion of the said attorney above named for

plaintiff as well as for the defendant that the said telegrams mentioned in said stipulation from No. 1 to No. 38, inclusive, may be delivered by the operator in charge of the United States Signal Corps at Juneau, Alaska, to the said R. E. Robertson and to be held by the said Robertson subject to the orders of this Court and to be returned when used by said Court to the operator in charge of the said United States Signal Corps at Juneau, Alaska.

Done in open court this 23d day of April, A. D. 1912, at Juneau, Alaska.

THOMAS R. LYONS,

District Judge.

Entered court journal, No. D, pages 187-8.

[Endorsed]: No. 821-B. In the District Court of the United States for the District of Alaska, Division Number One. United States of America vs. C. M. Summers and Stewart G. Holt. Order. Filed April 23, 1912. E. W. Pettit, Clerk. [167]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 821-B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order [Transferring Cause to Ketchikan].

Upon application of John Rustgard, United States Attorney, it is ordered that all papers and files in the above-entitled cause, relating to defendant C. M.

Summers, be transferred from the office of the clerk of the court at Juneau to the office of said clerk at Ketchikan.

Dated Monday, April 29, 1912.

THOMAS R. LYONS,
Judge.

(Criminal Journal, p. 189.) [168]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 277-K. B.

UNITED STATES

vs.

C. M. SUMMERS and STEWART G. HOLT.

Order Continuing Trial.

On this day, upon request of the defendant, by his attorney, W. S. Bayless, Esq., the Government being represented by John Rustgard, United States Attorney, it is ORDERED that this cause be, and it is hereby continued until Monday, May 13, 1912, at ten o'clock A. M.

Dated Monday, May 6, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 64.) [169]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 821-B—277-K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Order Continuing Trial.

Upon application of W. S. Bayless, Esquire, of counsel for defendant, John Rustgard, United States Attorney, appearing for the Government, it is ordered that the trial of defendant C. M. Summers be, and it is hereby, continued to Friday, May 17, 1912.

Dated Monday, May 13, 1912.

THOMAS R. LYONS,

Judge.

(Journal L. L. 3, page 80.) [170]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 277-K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Order Continuing Trial.

Now, on this day it appearing that the trial of Cause No. 278-K. B., United States vs. Cornelius Carrasco, is now in progress, the trial of C. M. Sum-

mers, one of the defendants herein, is hereby continued until ten o'clock A. M. to-morrow.

Dated Friday, May 17, 1912.

THOMAS R. LYONS,

Judge.

(Journal L. L. 3, page 97.) [171]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 277-K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Order Overruling Demurrer After Resubmission.

Now comes John Rustgard, United States Attorney; comes also the defendant C. M. Summers, in person, and by his attorney, L. P. Shackleford, Esquire. Whereupon said defendant, by and through his counsel, asks leave of the Court to withdraw his plea of "Not Guilty," heretofore duly entered herein, and to resubmit his demurrer to the indictment heretofore filed herein; and the United States Attorney not objecting thereto;

IT IS ORDERED that defendant be, and he is hereby, permitted to withdraw his plea of not guilty, as aforesaid, heretofore made and entered;

Whereupon the said demurrer of defendant C. M. Summers is again presented to the Court, and after arguments by counsel and the Court being fully advised in the premises;

IT IS ORDERED that said demurrer be, and the same is hereby, overruled, to which order overruling said demurrer, and each and every part thereof, defendant by counsel excepts and said exceptions are allowed.

Dated Saturday, May 18, 1912.

THOMAS R. LYONS,

Judge.

(Journal L. L. 3, pages 99-100.) [172]

*In the District Court for the District of Alaska,
Division No. One, at Ketchikan.*

No. 277-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Motion [for Continuance].

Comes now C. M. Summers, one of the defendants in the above-entitled action, by his attorney, and moves for a continuance of this cause for a period of 60 days or more to such time and place as the Court may name.

This motion is based upon the records and files herein and upon the affidavits of C. M. Summers and L. P. Shackelford hereto attached.

LEWIS P. SHACKLEFORD,

Attorney for Defendant.

Filed May 17, 1912. E. W. Pettit, Clerk. [173]

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

No. — —A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Affidavit of C. M. Summers [in Support of Motion for Continuance].

United States of America,

District of Alaska,—ss.

C. M. Summers, being first duly sworn, on oath deposes and says: I am one of the defendants in the above-entitled cause; that the indictment herein was returned about the 6th day of January, 1912; that L. P. Shackelford has had sole charge of the conduct of my defence herein, and that I have consulted with no one else concerning the merits of the same. That shortly after the return of the said indictment I was advised by the said L. P. Shackelford that I had a good and sufficient ground for demurrer to said indictment under section 43, Part II of the Alaska Code of Criminal Procedure and under other sections of said Code, and a demurrer was submitted and overruled and an exception taken under said advice. That thereafter and in the early part of the month of February, 1912, I had a further consultation with my said attorney in Portland, Oregon, in which he advised me that a trial would not be neces-

sary, and that I had my option to have judgment go against me and appeal without trial pursuant to the provisions of section 97 of said Code, and that it would not be necessary to prepare for a trial upon the merits at this time if such option were exercised, and I [174] therefore instructed my said attorney to proceed in that manner if in his judgment he deemed such action proper, and that no efforts have been made since said time to prepare for the said trial of this cause upon the merits, and no witnesses have been interviewed or their presence sought. That I again had a conference with my said attorney on or about the 16th day of April, 1912, at Portland, Oregon, and was advised by him to stand upon said demurrer and have judgment go against me under the provisions of section 97 of said Code, and then appeal. That I was not aware that any other section was claimed to be in conflict with section 97 of said Code, and continued to rely upon said advice of said attorney. That I was advised by my said attorney at said time that he had important engagements in the eastern part of the United States which would prevent his attending the Ketchikan term of this court in May, 1912, and that my said attorney prepared a form of election to stand upon the said demurrer herein and have judgment go against me herein, and the form of orders and exceptions to be taken so that this cause might proceed expeditiously to appeal without trial on the merits; and my said attorney requested me to take these said forms to W. S. Bayless, an attorney of this Bar, with instructions to proceed accordingly, and that on or about the 1st

day of May, 1912, I announced my intention to stand upon said demurrer as aforesaid through said W. S. Bayless, and was completely surprised by a contention on the part of said United States Attorney that section 97 of said Code was inapplicable and that a trial upon the merits must be had at Ketchikan in the month of May, 1912. Whereupon I caused my said attorney, L. P. Shackleford, to be informed, and requested his immediate presence at Ketchikan, Alaska, and a continuance was requested until he could arrive, and this affidavit is made immediately upon his arrival at Ketchikan, Alaska. That I am totally unprepared to proceed with the trial upon the merits of said cause at this time, and cannot safely proceed for at least 60 days. That the presence of my said attorney, L. P. Shackleford, is absolutely necessary for a proper defence of said [175] cause upon the merits, as he is the only one who is familiar with the details of the transactions involved herein, and that it would take at least 60 days for me to be assured of the attendance of proper witnesses and to properly prepare my case for defence with a new attorney if I were compelled to do so.

That I am ready and willing to stand upon the demurrer herein and have judgment go against me under section 97 of said Code without claiming any other rights under any other section of the laws applicable to the District of Alaska, if any there be, either in this Court or upon appeal therefrom. That I am further ready and willing to waive my right to be tried at Ketchikan, in the District of Alaska, in case

a continuance be granted for a period of 60 days or more.

C. M. SUMMERS.

Subscribed and sworn to before me this 17th day of May, A. D. 1912.

W. S. BAYLESS,

Notary Public for Alaska.

Filed May 17, 1912. E. W. Pettit, Clerk. [176]

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

No. — —A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Affidavit of L. P. Shackleford [in Support of Motion for Continuance].

United States of America,
District of Alaska,—ss.

L. P. Shackleford, being first duly sworn, on oath deposes and says: That I am the attorney for the defendant C. M. Summers in the above-entitled cause; that I have had sole charge and conduct of his case since the finding of the indictment herein; that in the month of April, 1912, I made an examination of the Alaska Code and decided to stand upon the demurrer heretofore presented and filed herein and allow judgment to go against the said defendant C.

M. Summers and appeal therefrom upon the questions raised by the said demurrer herein, pursuant to section 97 of the Alaska Code of Criminal Procedure; and that on or about the 20th of April, 1912, I advised the said defendant C. M. Summers that he had a right to stand upon said demurrer and appeal, and that it would not be necessary to go to trial herein or prepare for trial and to proceed to Juneau and have judgment taken against him, and to request W. S. Bayless, an attorney, to reserve the proper exceptions so that the said case might be promptly appealed. That relying upon said advice no further preparations were made for the defence of said cause and no witnesses subpoenaed for said trial on the part of the defence. That on or about the 1st day of May, 1912, the United States Attorney made the claim that section 97 of said Alaska Code was inapplicable in this cause and that a trial [177] must be had instead of standing upon said demurrer. That the contention of the said United States Attorney came as a surprise to affiant and defendant aforesaid, and that at that date it was impossible to prepare said case for a trial on the merits, and to secure the attendance of necessary witnesses during the month of May and complete the said trial prior to the date set for the re-convening of this Court at Juneau on or about the 1st day of June, and that said surprise was due to no negligence on the part of said defendant C. M. Summers, but occurred upon the advice of affiant as his counsel.

That affiant in the meantime has engaged himself to be present in the city of New York as the attor-

ney for B. L. Thane and others on the 25th day of May, 1912, to attend to the passing of titles and exchange of securities in the consolidation of the Oxford Mining Company with the Alaska Gastineau Mining Company, and it is absolutely necessary that affiant be present at said time so that said consolidation may be completed and work proceed upon said mining properties during the mining season of 1912, and that no other person can be engaged to perform said service for the reason that no one else is prepared to do so or is sufficiently familiar with the details involved in said transaction.

That, relying upon said section 97 of said Alaska Code, affiant has also engaged to be in the city of Chicago on the 3d day of June and until the 25th day of June, 1912, upon matters of importance, and that the said defendant C. M. Summers herein has not consulted with any other attorney concerning the merits of this case or its details, and is not in a position to proceed to trial upon the merits without the presence and advice and services of affiant. Affiant further states that he has consulted with said defendant C. M. Summers, and will be prepared to defend said cause after the 10th day of July, 1912, and affiant is informed that if necessary said defendant C. M. Summers is ready to waive his [178] right to a trial at Ketchikan, Alaska, and proceed with the trial at a Juneau term of said Court, or said defendant is willing to stand upon his said demurrer herein and have judgment given against him and proceed with an appeal from the ruling of said Court upon said demurrer.

That if any mistake has been made it has been due to the advice of affiant and to his belief that the Government would not and could not oppose the rendition of judgment under the provisions of section 97 of the Alaska Code of Criminal Procedure.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 17th day of May, A. D. 1912.

W. S. BAYLESS,

Notary Public for Alaska.

Filed May 17, 1912. E. W. Pettit, Clerk.

Due service of the within motion, affidavit of C. M. Summers and affidavit of L. P. Shackelford is admitted this 17th day of May, 1912.

JNO. RUSTGARD,

U. S. Atty. [179]

In the District Court for the District of Alaska, Division Number One, at Ketchikan.

No. — B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Notice of Election of Defendant C. M. Summers to Stand on Demurrer.

The defendant C. M. Summers, above named, having duly demurred to the indictment on file herein, and the said demurrer having been overruled and the defendant excepting, and the said defendant hav-

ing thereafter, by permission of the Court duly given, withdrawn his plea of not guilty and resubmitted his demurrer on file herein, and the Court having again overruled the said demurrer,

The defendant C. M. Summers now gives his notice of election to stand upon the said demurrer and not further plead and to take advantage of the provisions of section 97 of the Alaska Criminal Code of Procedure, and to submit to judgment thereunder and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit.

C. M. SUMMERS,

Defendant.

LEWIS P. SHACKLEFORD,

Attorney for Defendant.

[Endorsed]: Filed May 20, 1912. E. W. Pettit,
Clerk. By H. Malone, Deputy. [180]

*In the United States District Court for the District
of Alaska, Division Number One.*

No. 277-K. B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Objection to Proceeding Under Sec. 97, Alaska Code.

The defendant C. M. Summers having given notice to stand on his demurrer and to have judgment entered pursuant to the provisions of section 97, Part II of the Alaska Penal Code, the plaintiff objects to the entry of judgment until the cause herein has

been submitted to a jury for trial and a verdict rendered, the plaintiff maintaining that the provisions of said section 97 do not apply to the above-entitled cause but that sections 1026 and 1032 of the Revised Statutes of the United States govern the procedure.

JOHN RUSTGARD,
United States Attorney.

[Endorsed]: Filed May 20, 1912. E. W. Pettit,
Clerk. [181]

*In the United States District Court for the District
of Alaska, Division Number One.*

No. 277-K. B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

**Affidavit of John Rustgard in Answer to Affidavits
of C. M. Summers and Lewis P. Shackelford, and
in Opposition to Motion for a Continuance.**

United States of America,
District of Alaska,—ss.

John Rustgard, being duly sworn, deposes and says: That he is the United States Attorney for Division Number One, District of Alaska, and as such the attorney for plaintiff in the above-entitled cause. That in support of his opposition to defendant's motion for a continuance in the above-entitled cause deponent submits the following facts:

That the indictment herein was returned and filed on or about the 5th day of January, A. D. 1912. That

immediately thereupon the defendants herein were duly arraigned and each filed his demurrer to each count in said indictment, which demurrers were submitted and in each instance overruled by the Court. That thereupon and on or about the 6th day of January, A. D. 1912, each of the said defendants entered a plea of "not guilty," and the said defendant C. M. Summers immediately demanded a separate trial, which demand was immediately granted by the Court. That immediately thereupon the said defendant Summers moved for a change of venue from Juneau to Ketchikan, in [182] this Division, upon the ground that the prejudice against him at Juneau was so intense that he could not have a fair trial at that place, which motion for a change of venue was granted on or about the 8th day of January, A. D. 1912, and the cause against the said C. M. Summers set for trial at Ketchikan on the 6th day of May, this year. That at said time no suggestion was made to this deponent that the defendant intended in any manner to waive any trial or to have judgment entered under section 97, Part II of the Alaska Code, but that Lewis P. Shackleford stated in open court that he was not ready to go to trial for a considerable time thereafter and would not have opportunity to prepare the defense and be ready for trial until about the month of May. Thus intimating in the presence of the defendant and the Court he expected to have the cause tried upon its merits. And in reliance upon said intimation, this deponent took all the necessary steps to prepare the case for trial on behalf of the Government and to secure the attendance of witnesses.

That as late as the 6th day of April last, deponent had a conference with said Lewis P. Shackleford or W. S. Bayless with reference to said case and Shackleford or Bayless at that time was advised that this deponent was preparing subpoenas for the witnesses for the Government, and that many of these witnesses would have to be brought to Ketchikan from distant places in the States at a great deal of expense to the Government. But that no intimation at that time was made to this deponent that the defendant intended to rely upon and take advantage of the provisions of section 97 of the Alaska Code, and no steps were ever taken by the defendant or either of his counsel to prevent the Government from incurring the expense of preparing for trial and subpoenaing witnesses for this term of court.

That the said cause was called for trial at Ketchikan on the 6th day of this month but that at that time the [183] defendant Summers, through his attorney W. S. Bayless, asked for a continuance of the case until the 13th of this month, upon the statement and the reading of telegrams to the effect that Mr. Shackleford had met with an accident in New York and for that reason had not been able to leave that city in time to be in Ketchikan at the time the case was set for trial, but that he was on his way and would be in this city on or about the 13th of this month. That pursuant to said motion, and over the objection of counsel for the plaintiff, the trial was continued until Monday, the 13th of May, at 10 o'clock in the forenoon.

That at said last named time the said defendant

Summers, by and through his attorney W. S. Bayless, appeared in court and again moved that the case be continued until the 17th of May, stating that Mr. Shackelford had arrived in Seattle from New York on the evening of Friday, the 10th of May, but that through illness he had been unable to take passage for Ketchikan on the steamship "Jefferson," which sailed from Seattle on the evening of Saturday, the 11th of May, and would reach Ketchikan in the morning of the 14th; but that he would take passage on the next boat leaving Seattle, which would be the steamer "City of Seattle," and which latter boat would arrive in Ketchikan on the morning of the 17th, as aforesaid. That at that time in open court the said W. S. Bayless in the presence of the said defendant Summers and as his attorney, read to the court a telegram purporting to be from said Lewis P. Shackelford, wherein the said Shackelford stated that he was very desirous of being present at the trial but that on account of illness aforementioned he had been unable to take any boat prior to the departure of the said steamer "City of Seattle" from the port of Seattle, and that if the Court would continue the case until the morning of the [184] 17th the said Shackelford would not only be ready to go to trial but would help the Government in expediting the trial in every way he could. That pursuant to said motion and upon the said representation aforesaid, but over the objection of counsel for the plaintiff, the case was by the Court continued until 10 o'clock on Friday, the 17th of May, the Court at the same time explicitly and clearly stating that the case

at that time would proceed for trial whether Shackelford was present or not and that no further continuance would be granted.

That the Government in this case has incurred a very heavy expense in preparing for the trial and in securing the attendance of witnesses. That there are now in attendance upon this court as witnesses for the Government: two witnesses from San Francisco, California, 2 from Wenatchee, Washington, one from Chicago, Illinois, 2 from Washington, D. C., one from Skagway, Alaska, and three from Juneau, Alaska.

That deponent does not believe that the said defendant Summers ever intends to have this case tried upon its merits or that he intends at any time to submit any evidence in his own behalf, but that in the reliance upon the validity of his demurrers lies his only hope for an acquittal. That deponent does not believe that the motion for continuance is made in good faith, for the purpose of obtaining or preparing evidence on behalf of the defendant.

Further deponent saith not.

JOHN RUSTGARD.

Subscribed and sworn to before me, this 20th day of May, A. D. 1912.

[Court Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,
Division Number One.

[Endorsed]: Filed May 20, 1912. E. W. Pettit,
Clerk. [185]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 277-K. B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Affidavit of Louis P. Shackelford.

United States of America,
District of Alaska,
Division Number One,—ss.

Louis P. Shackelford, being first duly sworn on oath, deposes and says: that at ten o'clock A. M., May 20, 1912, John Rustgard, United States Attorney, at the time appointed for hearing the motion for continuance in this case, proceeded to read an affidavit of his which had not previously been filed or served; that in said affidavit it was stated:

“That as late as the sixth of April, last, deponent had a conference with Louis P. Shackelford with reference to said case, and said Shackelford at that time was advised that this deponent was preparing subpoenas for the witnesses for the Government and that many of these witnesses would have to be brought to Ketchikan from distant places in the United States at a great deal of expense to the government,” etc.

Affiant says that he never had any conversation with the District Attorney in the month of March or

April concerning the said case and never discussed it with him in any way, shape or form; that subsequently the said District Attorney amended the said affidavit by adding the words "or W. S. Bayless" after Louis P. Shackelford. Affiant says that W. S. Bayless was not present at the presentation of said motion and not in Ketchikan and that his affidavit on the subject cannot be obtained, but that he has never been advised by the said W. S. Bayless of any such conversation with the said United States Attorney.

Said United States Attorney further made the statement that [186] it was at the time he, the United States Attorney, entered into a stipulation with affiant concerning the testimony of the United States Signal Officer at Juneau. Affiant says that he had no such conversation with the District Attorney, but that the matter arose in the following manner: The United States Signal Officer at Juneau was unwilling to attend the trial and called affiant into the cable office at Juneau and presented to him a stipulation which had been written out by the United States Attorney for the purpose of relieving him, the Signal Officer, from attending the trial, and that at the request of the Signal Officer affiant signed the stipulation.

Affiant further states that the statements contained in the last paragraph of the affidavit of the said United States Attorney are untrue and entirely contrary to the advice which affiant has given to the defendant herein, C. M. Summers, but that affiant has advised the said C. M. Summers that he has a right

to be tried on any charge made against him alone without reference to other charges, and has advised him that it is unsafe for him to go to trial and attempt to meet the fifty-six different charges contained in the indictment herein at one trial; and that no lawyer or any number of counsel can safely prepare for the trial of said cause involving fifty-six different counts and a penalty under the statute ranging from 280 imprisonment years to 560 years' imprisonment.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 20 day of May, 1912.

[Court Seal]

E. W. PETTIT,

Clerk Dist. Court of Alaska, Div. No. One.

[Endorsed]: Filed May 20, 1912. E. W. Pettit,
Clerk. [187]

[Minute Order of Court Proceedings Prior to Signing of Sentence.]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 277-K. B.

UNITED STATES

vs.

C. M. SUMMERS et al.

Now on this day, the United States Attorney, John Rustgard, appearing for the plaintiff, and the defendant C. M. Summers being present in court in person and represented by his attorney, L. P. Shack-

ford, Esquire; and said defendant C. M. Summers having given notice that he would stand on his demurrer heretofore filed herein and have judgment entered pursuant to the provisions of section 97, Part II of the Alaska Penal Code; and the plaintiff objecting to the entry of judgment until this cause has been submitted to a jury for trial and a verdict rendered herein, the plaintiff maintaining that the provisions of said section 97, Part II, of the Penal Code of Alaska do not apply to the above-entitled cause, but that sections 1026 and 1032 of the Revised Statutes of the United States govern the procedure; after arguments by counsel for both sides, and the Court, being fully advised in the premises, rules that the Federal procedure prevails in all proceedings in this cause; but that the defendant C. M. Summers may waive trial by jury, if he so elects, and have judgment entered against him pursuant to the provisions of section 97, Part II, of the Alaska Penal Code; to which ruling the plaintiff excepts and said exception is allowed.

Whereupon the motion for continuance is withdrawn at the request of defendant C. M. Summers and his counsel, L. P. Shackleford, Esquire.

Thereupon the defendant C. M. Summers is asked by [188] the Court if he is guilty or not guilty of the crime charged against him in the indictment herein, namely, that of violation of section 5209, Revised Statutes of the United States, to which the said defendant C. M. Summers stands mute and refuses to plead herein, electing to stand on his demurrer herein and have judgment rendered against him in

accordance with the provisions of section 97 of the Alaska Penal Code.

Whereupon the defendant C. M. Summers waives time for sentence, but the time for entry of sentence is continued until three o'clock P. M. to-day.

Thereupon at said hour of three o'clock P. M. of this day comes John Rustgard, United States Attorney; comes also the defendant in person and represented by his attorney, L. P. Shackelford, Esquire; whereupon the following Judgment and Sentence in this cause is presented, signed and ordered filed and entered in this cause, to wit:

Dated Tuesday, May 21, 1912.

THOMAS R. LYONS,

Judge.

(Journal L. L. 3, page 103.) [189]

*In the United States District Court for the District
of Alaska, Division Number One.*

No. 277-K.B.

UNITED STATES OF AMERICA

vs.

C. M. SUMMERS and STEWART G. HOLT.

Judgment and Sentence.

An indictment having been duly found and filed in the above-entitled cause against C. M. Summers and Stewart G. Holt, and each of them, charging each of said defendants in fifty-six separate counts with violations of section 5209 of the Revised Statutes of the United States, and the said C. M. Summers having filed and submitted his demurrer to each of said

counts in said indictment and to the whole of said indictment, and said demurrer having been by this Court duly and in all respects disallowed and overruled as to each of said counts and to the whole of said indictment, and the said defendant C. M. Summers at Ketchikan, in said Division and District, on Monday, the 20th day of May, A. D. 1912, having duly appeared personally in open court, accompanied by his attorney, L. P. Shackelford, and then and there in open court refused to plead to said indictment and given his notice of election to stand upon said demurrer and not further plead and to take advantage of the provisions of section 97 of the Alaska Criminal Code of Procedure and to submit to judgment thereunder, and the plaintiff herein, through and by John Rustgard, Esquire, United States Attorney for Division Number One, District of Alaska, attorney for plaintiff herein, having duly entered his objection to said procedure under said section 97 and requested that a plea of Not Guilty be entered on behalf of the defendant C. M. Summers, and that said defendant be tried upon each count in said indictment before a jury before [190] judgment be entered, and the said objection having been duly overruled by the Court, and said request on the part of plaintiff having after arguments submitted by the respective parties been, on this 21st day of May, A. D. 1912, in open court, at Ketchikan, in said Division and District, in presence of the said defendant C. M. Summers personally, denied:

NOW, THEREFORE, the said C. M. Summers being personally present before this Court, accom-

panied by his attorney, L. P. Shackelford, and having elected to stand on said demurrer and have judgment entered herein, and having refused to plead after such demurrer was disallowed and overruled;

IT IS HEREBY ADJUDGED AND DECREED that the said defendant C. M. Summers is guilty of each offense charged in each count in said indictment herein, and the said defendant C. M. Summers having been asked by the Court whether he has anything to say why sentence herein should not be pronounced against him, and he having declared that he had nothing to say why sentence should not now be pronounced upon him, except that he de- T. R. L. sired to test his demurrer upon appeal.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that you, the said C. M. Summers, one of the defendants in the above-entitled cause, in punishment of the offenses aforesaid, of which you have been adjudged guilty as charged, be and you hereby are sentenced to be confined in the United States Penitentiary at McNeil's Island, in the State of Washington, for a period of five years for each of said fifty-six offenses charged in said indictment herein and of which you have been so found guilty, said periods of five years to run concurrently and the entire sentence to be completed upon the service of five years, and you [191] are now and herewith committed to the custody of the United States Marshal for the execution of this sentence, time to commence to run from the time of incarceration in said penitentiary.

Done in open court at Ketchikan, this 21st day of May, A. D. 1912.

THOMAS R. LYONS,

District Judge.

To the whole of which judgment and sentence, and each and every part thereof, and as to each and every count in the indictment, the defendant excepts and his exceptions are allowed.

THOMAS R. LYONS,

District Judge.

Entered Court Journal, No. 3 L. L., pages 103-4.

[Endorsed]: Form No. 680. No. 277-K.B. In the District Court of the United States for the District of Alaska, Division Number One. United States of America, vs. C. M. Summers and Stewart G. Holt. Judgment and Sentence. Filed May 21, 1912. E. W. Pettit, Clerk. By _____, Deputy. [192]

In the District Court for the District of Alaska, Division No. 1.

821-B. or 277-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Bond on Writ of Error.

Know All Men by These Presents, that a judgment having been given on the 21st day of May, 1912,

whereby C. M. Summers, one of the defendants above named, was adjudged guilty under each of the fifty-six counts upon the indictment on file herein and condemned to serve the term of five years at the United States Penitentiary at McNeil's Island in the State of Washington, and he having sued out a writ of error and appealed from said judgment, and been duly admitted to bail in the sum of ten thousand dollars:

We, J. R. Heckman, residing at Ketchikan, Alaska, and merchant by occupation, and J. J. Daly, residing at Ketchikan, Alaska, and manufacturer by occupation, and Henry Shattuck, residing at Juneau, Alaska, merchant and manufacturer by occupation, hereby undertake that the above-named C. M. Summers shall in all respects abide and perform the orders and judgments of the Appellate Court upon appeal, or if he fail to do so in any particular that we will pay the United States the sum of ten thousand dollars.

Dated at Ketchikan, Alaska, May 21st, 1912.

J. R. HECKMAN.

J. J. DALY.

HENRY SHATTUCK.

Taken and acknowledged before me the day and year above written.

[Court Seal]

THOMAS R. LYONS,

Judge District Court, District of Alaska, Division

No. 1. [193]

The United States of America,
District of Alaska,—ss.

J. R. Heckman, J. J. Daly and Henry Shattuck,
each being first duly sworn, on oath deposes and says,
each for himself:

I am a resident within the District of Alaska, but
no counselor, or attorney, marshal, clerk of any court,
or other officer of any court. That I am worth the
sum of six thousand seven hundred dollars, exclusive
of property exempted from execution, and over all
just debts and liabilities.

J. R. HECKMAN.

J. J. DALY.

HENRY SHATTUCK.

Subscribed and sworn to before me this 21st day
of May, 1912.

[Court Seal] THOMAS R. LYONS,
District Judge, First Division, District of Alaska.

[Endorsed]: No. 821-B—277-K. B. In the Dis-
trict Court for the District of Alaska, Division No. 1.
United States, vs. C. M. Summers and Stewart G.
Holt. Bond on Writ of Error by C. M. Summers.
Filed May 21, 1912. E. W. Pettit, Clerk. [194]

In the District Court for the District of Alaska, Division No. 1.

No. 277-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Petition for Writ of Error and Order Allowing Same.

C. M. Summers, defendant in the above-entitled cause, feeling himself aggrieved by the judgment of the Court entered on the 21st day of May, 1912, adjudging him guilty of each of the fifty-six counts under the indictment herein and condemning him to imprisonment for the period of five years, now petitions the said court for an order allowing the defendant a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, to review the said judgment and proceedings.

Dated at Ketchikan, Alaska, May 21st, 1912.

LEWIS P. SHACKLEFORD,

Attorney for Defendant C. M. Summers.

Now, on this 21st day of May, 1912, it is ordered that the writ of error above prayed for be allowed, and it is further ordered that the said writ of error shall be and operate as a supersedeas, and that ex-

ecution of judgment herein be suspended forthwith.

THOMAS R. LYONS,

Judge of the District Court for the District of
Alaska, Division No. 1.

Entered Court Journal, No. L. L. 3, Page 105.

[Endorsed]: Filed May 21, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [195]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 277-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Assignment of Errors.

Comes now the defendant, C. M. Summers, in the above-entitled action, and assigns the following errors as having been committed by the Court in the proceedings in the above-entitled action upon which the defendant intends to and does rely in prosecuting his writ of error herein.

First: The Court erred in overruling the demurrer of the said defendant to the indictment as a whole.

Second: The Court erred in overruling the demurrer to the indictment as a whole on the first ground specified in the demurrer.

Third: The Court erred in overruling the demurrer to the indictment on the second ground specified in the demurrer.

Fourth: The Court erred in overruling the demurrer to the indictment on the third ground specified in the demurrer.

Fifth: The Court erred in overruling the demurrer to the indictment on the fourth ground specified in the demurrer.

Sixth: The Court erred in overruling the demurrer to each and every one of the fifty-six counts in the indictment (a) as a whole, (b) on the first ground specified, (c) on the second ground specified, (d) on the third ground specified, (e) on the fourth ground specified.

Seventh: The Court erred in entering judgment against the defendant herein. [196]

Eighth: The Court erred in entering judgment against the defendant herein upon each and every one of the fifty-six counts in the indictment, either jointly or severally, as to each of said counts.

Ninth: The Court erred in sentencing the defendant herein under said judgment.

Tenth: The defendant further alleges that the judgment is erroneous and the Court erred in allowing the indictment to stand herein and judgment to be entered thereon for the reason that the indictment herein charges more than one crime, to wit: fifty-six crimes, and violated section 43 of the Alaska Criminal Code of Procedure, chapter 7, and section 90, chapter 10, both in allowing the indictment to stand against the demurrer of the defendant and in proceeding to judgment on the various counts in

the said indictment and judging on more than one crime.

LEWIS P. SHACKLEFORD,
Attorney for the Defendant.

[Endorsed]: Filed May 21, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [197]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 277-K. B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Honorable, the Judge of the District Court
for the District of Alaska, First Division:
Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, which is in the said
District Court before you, between the United States
of America, Plaintiff, and C. M. Summers, defend-
ant, a manifest error hath happened to the great
damage of the defendant C. M. Summers, plaintiff
in error, as by his complaint appears.

We be willing that error, if any hath been, should
duly be corrected and full and speedy justice be

done to the party aforesaid in this behalf, do command you that then under your seal you send the record and proceedings aforesaid and all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, in the city and county of San Francisco, State of California, together with this Writ, so as to have the same [198] at said place in the said Circuit Court within thirty days from the date of this Writ, that the record and proceedings aforesaid being inspected the Circuit Court of Appeals may cause further to be done therein to correct these errors as according to the right and the laws and customs of the United States of America should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of May, 1912.

Witness the hand and seal of the District Court for the District of Alaska, First Division, at the clerk's office at Ketchikan, Alaska, this 21st day of May, 1912.

[Seal] E. W. PETTIT,
Clerk of the District Court for the District of Alaska,
First Division.

Allowed this 21st day of May, 1912.

THOMAS R. LYONS,
Judge of the District Court for the District of
Alaska, First Division.

Due service of the foregoing Writ of Error is hereby admitted this 21st day of May, 1912.

JOHN RUSTGARD,
United States Attorney for the District of Alaska,
First Division. [199]

[Endorsed]: No. ——. In the Circuit Court of the United States for the Ninth Circuit. United States of America vs. C. M. Summers and S. G. Holt. Writ of Error. Filed May 21, 1912. E. W. Pettit, Clerk. By ———, Deputy. [200]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 277-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Citation.

United States of America,—ss.

The President of the United States of America, to the United States and to John Rustgard, Esquire, the District Attorney for the District of Alaska, First Division:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, in the State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the District Court for the District of Alaska, First Division, wherein C. M. Summers is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should

not be reversed and speedy justice should not be done to the said C. M. Summers in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of May, [201] 1912.

THOMAS R. LYONS,
Judge of the District Court for the District of Alaska, First Division.

[Seal] Attest: E. W. PETTIT,
Clerk of the District Court for the District of Alaska, First Division.

Due service of the foregoing Citation is hereby admitted this 21st day of May, 1912.

JOHN RUSTGARD,
United States Attorney for the District of Alaska,
First Division. [202]

[Endorsed]: No. —. In the Circuit Court of the United States for the Ninth Circuit. United States of America vs. C. M. Summers and S. G. Holt. Citation. Filed May 21, 1912. E. W. Pettit, Clerk. By ———, Deputy. [203]

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

No. 277-K. B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. M. SUMMERS and S. G. HOLT,

Defendants.

Order [Extending Time for Filing Transcript of Record].

On the application of L. P. Shackelford, attorney for the defendant C. M. Summers herein, IT IS ORDERED that the time for filing the transcript of record herein be, and the same is hereby, extended until the fifteenth day of August, 1912.

AND IT IS FURTHER ORDERED that all of the records and files herein, including the journal entries, are made a part of the record herein and shall be and constitute the Bill of Exceptions, and that the clerk may certify the same as a part of the Bill of Exceptions.

Done in open court at Ketchikan, Alaska, May 21st, 1912.

THOMAS R. LYONS,
Judge.

(Journal L. L. 3, page 105.)

[Endorsed]: Filed May 21, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [204]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 821-B.—277-K.B.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

C. M. SUMMERS,

Defendant and Plaintiff in Error.

Clerk's Certificate.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached two hundred four pages of typewritten matter, numbered from one to two hundred four, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error and also in accordance with the Order of this Court made and entered May 21, 1912, on file in my office and made a part hereof, in Cause No. 821-B, 277-K. B., of the above-entitled court wherein the United States of America is plaintiff and defendant in error; and C. M. Summers is defendant and plaintiff in error.

I do further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to ninety-three and 35/100 (\$93 35/100) dollars, will be paid to me by the attorneys for the defendant and plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-entitled court this 3d day of August, A. D. 1912.

[Seal]

E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division

No. 1. [205]

[Endorsed]: No. 2177. United States Circuit Court of Appeals for the Ninth Circuit. C. M. Summers, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Received August 10, 1912.

F. D. MONCKTON,

Clerk.

Filed August 29, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: Printed Transcript of Record. Filed
Sept. 30, 1912. F. D. Monekton, Clerk.

No. 2177

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

ADDENDA.

**Proceedings Had in the United States Circuit
Court of Appeals for the Ninth Circuit.**

At a stated term, to wit, the October term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the twenty-third day of October, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Directing That Transcript of Record be
Refiled Nunc Pro Tunc as of August 10, 1912,
etc.**

Upon motion of Mr. Lewis P. Shackleford, counsel for the plaintiff in error, and Mr. United States Attorney John L. McNab, having been heard on behalf of the defendant in error,

It is ORDERED that the original certified Transcript of the Record in the above-entitled cause be re-filed by the Clerk of this Court *nunc pro tunc* as of the 10th day of August, A. D. 1912, the date on which the said record was received in the clerk's office of this Court, and that the cause be docketed accordingly.

At a stated term, to wit, the October term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the twenty-ninth day of October, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order of Submission.

ORDERED, above-entitled cause argued by Mr. Lewis P. Shackleford, counsel for the plaintiff in error, and by Mr. United States Attorney John Rustgard, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file a reply-brief within five (5) days from date.

[Opinion, U. S. Circuit Court of Appeals.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error,

L. P. SHACKLEFORD, and SHACKLE-
FORD & BAYLESS, for the Plaintiff in
Error.

JOHN RUSTGARD, United States Attorney,
District of Alaska, Division Number One,
for the Defendant in Error.

Before GILBERT and ROSS, Circuit Judges, and
WOLVERTON, District Judge.

GILBERT, Circuit Judge:

The plaintiff in error was indicted under section 5209 of the Revised Statutes, relating to National Banks, and was charged with fifty-six separate crimes thereunder. He demurred to the indictment on the ground that it violated sec. 43 of Carter's Alaska Code, p. 52 (30 Stat. 1290), which provides "that the indictment must charge but one crime and in one form only." The demurrer was overruled. The plaintiff in error elected to stand upon the demurrer, and refused to plead further. He was thereupon adjudged guilty of each one of the fifty-six crimes, and was sentenced accordingly.

The question presented on the writ of error is whether the procedure in the court below was controlled by section 1024 of the Revised Statutes, or by section 43 of the Alaska Code of Criminal Procedure. Section 1024 provides as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases, the court may order them to be consolidated." This section was carried into the Revised Statutes from the Act of Congress of February 26, 1853, 10 Stats. at Large, 161, entitled "An Act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States, and for other purposes." The act contains numerous provisions for carrying out the purposes thereof, including the regulation of the fees of officers, witnesses and jurors, and contains the proviso that "in the State of California and the territory of Oregon, officers, jurors and witnesses shall be allowed for the term of two years, double the fees and compensation allowed by this Act," etc. It is contended that section 1024 never applied to territorial courts, but only to the United States Circuit and District Courts, for the reason that the title of the Act of February 26, 1853, limits its scope to the Circuit and District Courts of the United States, and the enacting clause

limits its application to officers, etc., "in the several states," and cases are cited which hold that the territorial court of Alaska is not a District Court of the United States. *McAllister vs. United States*, 141 U. S. 174; *Steamer Coquitlam vs. United States*, 163 U. S. 346. It may be conceded that if the question of the applicability of the statute depends upon the question whether or not the District Courts of Alaska are District Courts of the United States, the section does not apply to procedure in the former. But the question is a broader one, and depends upon other considerations, and, first, we are to regard the intention of Congress as expressed in other legislation. By the Act of May 17, 1884, 23 Stat. 24, entitled "An Act providing a civil government for Alaska," it was provided, "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." By that Act, Alaska became an organized territory, and was brought within the provisions of section 1891 of the Revised Statutes which declares: "The Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States." In *Kie vs. United States*, 27 Fed. 351, Judge Deady held that the District Court of Alaska had jurisdiction under sections 5339 and 5341, Revised Statutes, to try and punish any inhabitants of the district for the crimes of murder or man-

slaughter, and that the law of Oregon defining those crimes and describing the punishment therefor was not in force in Alaska, that jurors must be selected in the manner provided by the Act of Congress of June 30, 1879, 21 Stat. 43, and have the qualifications prescribed by the laws of Oregon. Said the Court: "No law of Oregon is to have effect in Alaska if it is in conflict with the law of the United States. There is such a conflict within the meaning of the statute, not only when these laws contain different provisions on the same subject, but when they contain similar or identical ones. In the latter case, it is the law of Congress that applies, and not that of the State." In the Act of March 3, 1899, 30 Stats. 1253, entitled "An Act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said district," the enacting clause was "That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows," and section 2, Chapter 1, Title 1, provides "That the crimes and offenses defined in this Act committed within the District of Alaska shall be punished as herein provided." Then follows a code of criminal procedure in which is found, under Title II, the section 43 above quoted, "that the indictment must charge but one crime and in one form only." From these provisions, standing alone, it seems clear that it was the intention of Congress to make section 43 applicable only to the crimes and offenses specifically defined in the act. The offense with which the plaintiff in error was charged is not one of those crimes or

offenses, but is an offense against the laws of the United States, which was defined in section 5209 of the Revised Statutes. In brief, the enacting clause provides for the procedure which shall be adopted in enforcing the penal and criminal laws which are contained in the criminal code of Alaska, and no others, and section 43 is a provision regulating procedure.

But it is said that a contrary intention is shown in the provisions of section 10 of Chapter 4, Title II, and section 13 of Chapter 5, Title II. Section 10 provides "That Grand Juries to inquire into crimes designated in Title I of this Act, committed or triable within said district shall be selected and summoned, and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to Grand Juries of the United States District and Circuit Courts, the true intent and meaning of this section being that but one Grand Jury shall be summoned in each division of the Court to inquire into all offenses committed or triable within said district, as well those that are designated in Title I of this Act, as those that are defined in other laws of the United States." Section 13 provides: "That the Grand Jury have power, and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the Court, and present them to the Court, either by presentment or indictment, as provided in this Act." Whatever may be said of the meaning of section 10, and it is obscurely phrased in one particular, it cannot be construed as indicating the intention of Congress that the procedure before Grand Juries shall be

governed in all respects by the provisions of the Alaska Criminal Code. As we construe it, section 10 is in harmony with section 2, Chapter 1, Title I, and affirmative of the meaning which we have given that section. It contemplates that the Grand Jury shall inquire into (a) all offenses designated in Title I, and (b) those offenses that are defined in other laws of the United States, thereby recognizing the dual jurisdiction of the territorial court, and it provides that the Grand Jury shall be selected and summoned, and that their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to Grand Juries of the District and Circuit Courts. The dispute is over the meaning of the clause "and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to Grand Juries of the United States District and Circuit Courts. What is the manner prescribed by the laws of the United States? Clearly, as to offenses against the United States, it is the proceeding defined in the statutes of the United States, and as to all offenses coming within the provisions of the Criminal Code of Alaska, which is also a "law of the United States," it is the manner prescribed therein, for it was evidently not the intention of the section to make laws of the United States with respect to procedure before Grand Juries of the Circuit and District Courts applicable to those offenses. To hold so, would be to contradict the very purpose of the act. There is no difficulty in the way of construing section 13 in harmony with section 2 of Chap-

ter 1, Title I, and section 10 of Chapter 4, Title II. The clause "and present them to the Court, either by presentment or indictment as provided in this act," refers to all offenses committed or triable within the jurisdiction of the Court, both offenses against the Criminal Code of Alaska, and offenses against other laws of the United States, and the words "as provided in this Act" do not limit the procedure to that which is defined in the criminal code, but extend it to that which is provided for the trial of other offenses against the laws of the United States, as indicated in said section 10, which is also a part of "this Act."

But aside from the intention of Congress as expressed in the acts specifically relating to Alaska which we have just considered, there is no substantial reason why that clause in the Act of February 26, 1853, which became section 1024 of the Revised Statutes does not now apply to all territorial courts as well as to the Circuit and District Courts of the United States in all cases of offenses against the laws of the United States. It is a general provision, and there is to be found in the Act itself and in the subsequent amendment thereof, ground for holding that it was the intention to apply it to all courts of the United States, whether in states or territories. The principal object of the Act of February 26, 1853, was to reduce the fees and costs of clerks, marshals and attorneys, etc., in the Circuit and District Courts of the United States, as appears in its title, to which was added "and for other purposes." The enacting clause declares "that in lieu of the compensation

now allowed by law to attorneys, * * * clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers in the several states, the following and no other compensation shall be taxed and allowed." In the General Appropriation Act of March 3, 1855, it was provided that the provisions of the Act of February 26, 1853, "are hereby extended to the territories of Minnesota, New Mexico, and Utah, as fully in all particulars as they would be had the word 'territories' been inserted in the sixth line after the word 'States,' and the same had read 'in the several States and in the territories of the United States.'" It is true that there were at that time other territories of the United States than those which were specifically named. But in the Revised Statutes, in section 823, it was provided that the fees as established by the Act of February 26, 1853, shall be taxed and allowed "in the several states and territories," and although section 1024, the purpose of which was also to reduce the fees of officers, was detached from its connection with the regulation of fees which it had in the Act of March 3, 1855, it should be held that it was intended to be a general provision of criminal procedure applicable to all prosecutions of offenses against the United States committed in the States and territories. In dealing with such offenses, the territorial courts, although not included within the designation Circuit and District Courts of the United States, are nevertheless courts of the United States. *United States vs. Haskins*, 3 Sawyer, 262; *Price vs. McCarty*, 32 C. C. A. 162; *Embry vs. Palmer*, 107 U. S. 3, 9.

Counsel for the plaintiff in error cite a line of decisions such as *Clinton vs. Englebrecht*, 13 Wall. 434; *Hornbuckle vs. Toombs*, 18 Wall. 648; *Good vs. Martin*, 95 U. S. 90; *Reynolds vs. United States*, 98 U. S. 145; *Miles vs. United States*, 103 U. S. 304; *United States vs. Pridgeon*, 153 U. S. 48; *United States vs. Fitzpatrick*, 178 U. S. 304, as authority for the proposition that both under the Act of May 17, 1884, providing for a civil government for Alaska, and under the Act of March 3, 1899, the law of Oregon was adopted as the rule of procedure in all cases in the District of Alaska. It is true that these decisions hold that the territorial courts are not courts of the United States, but are legislative courts of the territories, and that in the manner of summoning and impanelling jurors, the practice, pleadings, forms and modes of procedure, qualifications of witnesses, and forms of indictment prescribed by statute for the Circuit and District Courts of the United States have no application to them, but that they are required to follow the territorial law in all those respects unless it be otherwise provided by a statute of the United States. But in *Page vs. Burnstine*, 102 U. S. 664, it was held that section 858 of the Revised Statutes which declares that "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party,

or required to testify thereto by the court," applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. The Court said: "These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to 'courts of the United States.' *Clinton vs. Englebrecht*, 13 Wall. 434; *Hornbuckle vs. Toombs*, 18 Id. 648; *Good vs. Martin*, 95 U. S. 90. No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us." The decision in *Fitzpatrick vs. United States*, 178 U. S. 304, is not authority for a contrary view, notwithstanding that the crime charged was a murder in a "place or district of country under the exclusive jurisdiction of the United States" as defined in Rev. Stat., sec. 5339, and that the Court held that the sufficiency of the indictment was to be determined by

the law of Oregon as extended to Alaska under the Act of May 17, 1884, and not by the common law. There was no question there of the application of a statute of the United States regulating procedure as against the procedure so adopted for Alaska. The purport of the decision was that the law of Oregon was not inapplicable, and was not in conflict with the provisions of the Act of May 17, 1884, or the laws of the United States.

The judgment is affirmed.

[Endorsed]: No. 2177. United States Circuit Court of Appeals for the Ninth Circuit. Opinion. Filed Feb. 3, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Alaska, Division No. 1.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Alaska, Division No. 1, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered February 3, 1913. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the twentieth day of February, in the year of our Lord one thousand nine hundred and thirteen: Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to April 1, 1913, to File
Petition for Rehearing.**

On motion of Mr. Thomas R. White, made on behalf of Mr. Lewis P. Shackleford, counsel for the

plaintiff in error, it is ORDERED that the motion, this day filed by Mr. Shackelford for an extension of the time within which a Petition for Rehearing may be filed in the above-entitled cause be, and hereby is granted, and that the time within which a Petition for Rehearing may be filed in said cause be, and hereby is extended to April 1, 1913.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Certificate of Clerk U. S. Circuit Court of Appeals to
Record Certified Under Section 3 of Rule 37 of
the Rules of the Supreme Court of the United
States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and fifteen (215) pages, numbered from and including one (1) to and including two hundred and fifteen (215), to be a true copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this fourteenth day of March, A. D. 1913.

[Seal]

F. D. MONCKTON,

Clerk.

UNITED STATES OF AMERICA, *ss.*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which C. M. Summers is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Alaska, Division No. 1, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3d day of May, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23,620. Supreme Court of the United States, No. 1045, October Term, 1912. C. M. Summers vs. The United States. Writ of Certiorari. Docketed, No. 2177. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 19, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Supplemental Transcript of Record.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit on Petition for Rehearing.

Index to Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit on Petition for Rehearing.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

	Page
Petition for Rehearing.....	3
Opinion of U. S. Circuit of Appeals on Petition for Rehearing..	6
Order Denying Petition for a Rehearing.....	10
Certificate of Clerk U. S. Circuit Court of Appeals to Supplemental Transcript of Record.....	11

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Petition for Rehearing.

To the Honorable the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

Comes now C. M. Summers, plaintiff in error above named, and respectfully petitions this Court for a rehearing of the above-entitled cause and respectfully shows to the Court:

First. That a rehearing of the above-entitled cause should be granted, for the reason that the third specification of error was not considered or discussed in the opinion of the Court; and, in support of this ground for rehearing your petitioner respectfully shows to the Court that under the rulings of the Supreme Court of the United States in the case of Callan vs. Wilson, 127 U. S. (page 540), Thompson vs. Utah, 170 U. S. (page 343), Rasmuson vs. United States, 197 U. S. (page 516), and Schick vs. United States, 195 U. S. (page 65), a judgment of conviction in a criminal case other than a petty offense is void unless supported by a verdict of a jury of twelve and a jury trial cannot be waived even by express stipulation. Under the decision in the case of Callan vs. Wilson, supra, the question must either be decided in this case or in habeas corpus proceedings; that, for the sake of expedition and justice, this question should be decided in this cause and not left for decision through a multiplicity of suits.

Second. Your petitioner respectfully requests that a rehearing be had upon the ruling of this Court sustaining the ruling of the lower Court with reference to the petitioner's demurrer to the indictment,

and your petitioner respectfully shows to the Court that the question involved in this case depends upon the question as to whether section 1024 of the Revised Statutes of the United States has application to the territories and territorial courts; and your petitioner respectfully urges and claims that under the rulings of this Court in *Corbus vs. Leonhardt*, 114 Federal (page 10), *Jackson vs. United States*, 102 Federal (page 473), and the rulings of the Supreme Court of the United States in the cases of *Good vs. Martin*, 95 U. S. (page 90), *Thiede vs. Utah*, 159 U. S. (page 510), *Hornbuckle vs. Toombs*, 18 Wall. (page 648), *Reynolds vs. United States*, 98 U. S. (page 145), the law is that all general statutes of procedure found in the Revised Statutes which upon their face do not exhibit a specific intention on the part of Congress to have them apply to the territorial courts, are presumed to apply only to procedure in Federal, Circuit and District Courts.

And your petitioner further requests a rehearing upon the questions raised by the demurrer to the indictment, upon the ground that this Court has failed to consider that portion of the Act of May 17, 1884, providing for civil government for Alaska, which placed the District attorneys for Alaska upon a salary and made those statutes relating to the fee system and the conduct of district attorneys in connection therewith inapplicable to Alaska.

Your petitioner further shows that this Court has failed in its opinion to consider the provisions of the Act of March 4, 1909, being the new Penal Code of the United States, under chapter entitled "Certain offenses in the Territories," and that section of that chapter which permits the joinder in one indictment of only certain offenses therein named.

Petitioner further asks to be made a part hereof a brief of his attorney in support of this petition, which will be filed herein.

C. M. SUMMERS, *Petitioner*,
By LEWIS P. SHACKLEFORD,
His Attorney.

The undersigned, one of the attorneys for the petitioner, C. M. Summers, hereby certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

LEWIS P. SHACKLEFORD.

[Endorsed:] Petition for rehearing. Filed Mar. 31, 1913. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Opinion of U. S. Circuit Court of Appeals on Petition for Rehearing.

Lewis P. Shackelford for Petitioner.

John Rustgard, United States Attorney, for plaintiff in Error.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

GILBERT, *Circuit Judge*:

The plaintiff in error in his petition for rehearing represents that this Court in its decision of the case passed without consideration the contention that the Court below in imposing sentence upon him denied him his constitutional right to a trial by jury, and argues that as the offense charged was a felony the plaintiff in error was without power to waive his right to a jury trial. There was no assignment to direct our attention to the alleged error although it was mentioned in the briefs. But as it is now earnestly urged as ground for granting a rehearing we deem it proper to present briefly our views upon the contention so made while denying the motion.

The record shows that the plaintiff in error having demurred generally to the indictment on the ground "that the facts stated do not constitute a crime," and the Court having overruled the demurrer, the plaintiff in error by permission of the Court withdrew his plea of not guilty and gave notice of his election to stand upon the demurrer and not further to plead, "and to take advantage of Section 97 of the Alaska Criminal Code of Procedure, and to submit to judgment thereunder." That section provides as follows:

"That if the demurrer be disallowed, the court permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

In the court below counsel for the plaintiff in error insistently contended that this section was applicable to the case at bar, and the Court adopted that view, although the District Attorney earnestly opposed the contention. Counsel for the plaintiff in error notwithstanding this record of his attitude in the court below now contends that the Court erred in accepting his view of the law, and in not compelling the plaintiff in error to plead over and go to trial before a jury, and he cites decisions to the proposition that one whose is accused of felony cannot waive his constitutional right to a jury trial. Those cases have no application here. There is no question here of a waiver of a jury trial. Here there was no issue to try and therefore no occasion for a jury. When a defendant demurs generally to an indictment he admits all the facts alleged against him and rests his defense on the judgment of the Court, whether those

facts as pleaded constitute the crime charged. The plaintiff in error by his demurrer to the indictment declared in effect that he was guilty of the offense charged, provided that the indictment properly and lawfully set forth the facts which constituted the crime. After the demurrer was overruled he had his right either to plead over or to stand on his demurrer and thereby continue in the attitude of admitting to the Court that he was guilty of committing the acts which were charged against him. He chose the latter course. At common law in cases of misdemeanor there was no right to plead over and in cases of felony such also was originally the common law, although in later years the rule has been relaxed in felony cases so as to recognize the power of the court in its discretion to allow the defendant to plead over. 2 Hale P. C. 255; Reg. v. Faderman, 3 C. & K. 359; Reg. v. Hendy, 4 Cox. C. C. 243; Reg. v. Odgers, 2 M. & Rob. 479; State v. Wilkins, 17 Vt. 171. The statute above quoted expresses the common law rule with the addition that the defendant shall have at his election the right to plead over.

In the brief filed in support of his petition for rehearing counsel for the plaintiff in error insists that the courts are practically unanimous "in holding that, as to felonies, in the absence of statutory authority a defendant cannot waive a jury trial, and an attempt to do so followed by a trial before the Court without a jury will be of no avail and a judgment rendered by the Court will be erroneous if not void." In the present case, however, as has been shown, there was and could have been no trial and Congress by Section 97 of the Alaska Criminal Code of Procedure expressly declared the consequence of the defendant's failure to raise an issue, namely, that there should thereupon be judgment against him.

The petition for rehearing is denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

At a stated Term, to-wit, the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of May, 1913.

Present:

Honorable William B. Gilbert, Circuit Judge.

Honorable Erskine M. Ross, Circuit Judge.

Honorable William H. Hunt, Circuit Judge.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Order Denying Petition for a Rehearing.

In accordance with the opinion of this Court, this day rendered and filed thereon, it is ordered that the Petition, filed March 31, 1913 on behalf of the Plaintiff in Error, for a Rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.
No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Supplemental Transcript of Record.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ten (10) pages, numbered from and including one (1) to and including ten (10), to be a full, true and correct copy of the following entitled papers, in the above-entitled cause, viz:

(1) The Petition, filed March 31, 1913, on behalf of the plaintiff in error for a rehearing of said cause;

(2) The Opinion, rendered and filed May 5, 1913, by the said Circuit Court of Appeals on said Petition for Rehearing; and

(3) The Order of said Circuit Court of Appeals, entered May 5, 1913, denying said Petition for Rehearing, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-first day of May, A. D. 1913.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

In the Supreme Court of the United States, October Term, 1912.

No. 1045.

C. M. SUMMERS, Petitioner,

v.

THE UNITED STATES, Respondent.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the record now on file in the Supreme Court of the United States shall constitute the return of the Clerk of the Circuit Court of Appeals for the Ninth Circuit to the writ of certiorari granted herein.

ALBERT FINK,
LEWIS P. SHACKLEFORD,
ALDIS B. BROWNE,
ALEX. BRITTON,
EVANS BROWNE,
KINNEL R. BABBITT,

Counsel for Petitioner.

JAMES C. McREYNOLDS,
II.,

Attorney General.

May 13, 1913.

(Endorsed:) No. 2177. United States Circuit Court of Appeals for the Ninth Circuit. C. M. Summers vs. The United States of America. Stipulation as to Return to Writ of Certiorari. Filed May 19, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page, to be a full, true, and correct copy of a Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States, filed in the above-entitled cause on the 19th day of May, A. D. 1913, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of May, A. D. 1913.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2177.

C. M. SUMMERS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ:

No. ~~1045~~

Office Supreme Court, U. S.
FILED.

APR 5 1913

JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

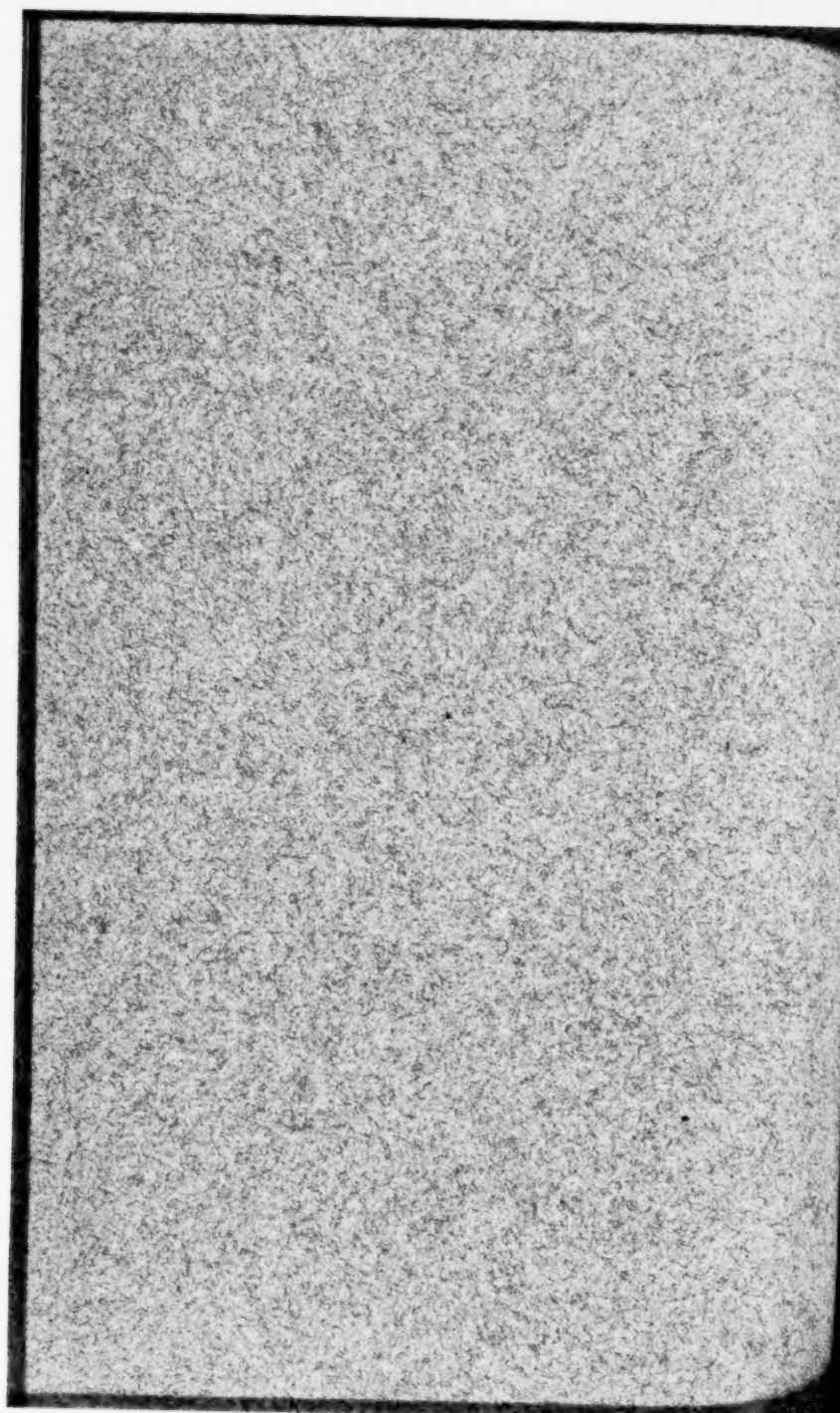
C. M. SUMMERS, PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

ALBERT FINK,
LEWIS P. SHACKLEFORD,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
KURNEL R. BABBITT,
Attorneys for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

C. M. SUMMERS, PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH JUDICIAL CIRCUIT.**

*To the Honorable the Supreme Court of the United
States:*

Comes now C. M. Summers, the petitioner above named, and respectfully shows to the court:

That on the 5th day of January, 1912, your petitioner was indicted in the District Court for the District of Alaska, Division No. 1, which said indictment contained fifty-six counts and charged the defendant herein with fifty-six separate and distinct crimes in violation of section 5209 of the Revised Statutes of the United States relating to national banks (see indictment, Tr., pp. 2-136).

Your petitioner further shows that he interposed his demurrer to said indictment on the ground that more than one crime was charged in the indictment, which said demurrer was based upon the act of the legislature of Oregon approved October 19, 1864, and which provided as follows:

“That the indictment must charge but one crime and in one form only except where a crime may be committed by use of different means the indictment may allege the means in the alternative.”

That the said provision of the law above quoted was part of the law of Oregon on the 17th day of May, 1884, and was adopted as the law of Alaska on the 17th day of May, 1884, by virtue of the provision of the act of Congress approved May 17, 1884, entitled “An Act Providing Civil Government for Alaska,” section 7 of which act reads as follows (vol. 23, Stat. at L., pp. 25-26):

“That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.”

And that the said provision above quoted prohibiting the statement of more than one crime in an indictment is now part of the laws of Alaska and is found in Carter’s Code of Alaska, title 11, sec. 43 (30 Stat. at L., p. 1290). That on the 18th day of May, 1912, the said demurrer, after argu-

ment before the court, was overruled and the petitioner was allowed to and did except to such ruling of the court (see Tr., pp. 163-164). That thereupon your petitioner gave his written notice of election to stand upon said demurrer and refused to plead further to the indictment (Tr., pp. 170-172).

And petitioner further shows that the court proceeded forthwith, and without any trial whatever did pronounce sentence upon your petitioner, adjudging your petitioner guilty of each one of the fifty-six crimes with which your petitioner was charged in said indictment, and sentenced your petitioner to five years' imprisonment for each one of the fifty-six crimes, providing the sentences be served concurrently (Tr., p. 185).

Your petitioner duly excepted to the whole of said judgment and sentences and to each and every part thereof, which exceptions were duly allowed to your petitioner (Tr., pp. 182-185).

Your petitioner further shows that immediately thereafter the said cause was removed by writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and that on the 3d day of February, 1913, the said United States Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court for the District of Alaska, Division No. 1, sentencing your petitioner upon each and every one of the fifty-six counts set forth in the said indictment.

Your petitioner respectfully shows that the said judgment of the District Court for the District of

Alaska and of the Circuit Court of Appeals for the Ninth Circuit is erroneous and void in that the said cause was not tried in the manner commanded by the Sixth Amendment to the Constitution of the United States, and petitioner has been deprived of the benefit of the decisions of this court in the case of *Rasmussen vs. The United States*, 197 U. S., 516, in which cause it was held that the Sixth Amendment to the Constitution of the United States applied to Alaska, and that the act of Congress providing for the trial of misdemeanors by a jury of less than twelve was unconstitutional and void; and your petitioner has further been deprived of the benefit of the decision of this court in the case of *Thompson vs. Utah*, 170 U. S., 343, in which it was held that the right to a trial by a jury of twelve persons in a criminal case could not be waived either by express consent or by silence. Your petitioner has further been deprived of the benefit of the decision of this court in the case of *Callen vs. Wilson*, 127 U. S., 540, wherein this court held that the courts of the District of Columbia were without jurisdiction to enter judgment in a criminal case where the defendant had not been tried by jury and in which case the judgment of the lower court was set aside and held for naught upon application for writ of *habeas corpus*, and your petitioner further shows that he has been deprived of the benefit of the decision of this court in the case of *Schick vs. United States*, 195 U. S., 65, wherein this court held that all criminal cases

must be tried by jury except that class of cases known as "petty offenses;" and your petitioner further shows that the judgment against your petitioner is void according to the course of decision in the other courts of this country and in England. In support of which petitioner cites *Re McQuown*, 11 L. R. A. (N. S.), 1136, and the exhaustive footnote thereto.

Your petitioner further shows that the judgment of the District Court for the District of Alaska and the Circuit Court of Appeals for the Ninth Circuit is void and erroneous in that it holds that section 1024 of the Revised Statutes of the United States has application to proceedings in this cause, because under the decision of this court in the case of *McAllister vs. United States*, 141 U. S., 174, and in the case of *The Coquiltam*, 168 U. S., 346, the District Court for the District of Alaska is not a circuit or district court of the United States; and petitioner further represents that the said ruling is erroneous and void for the reason that it has been the repeated decision of this court that general statutes of procedure found under the title "Judiciary" refer to United States circuit and district courts, and were not intended to apply to procedure in the courts of the Territories, and that by virtue of ruling of the lower court your petitioner has been deprived of the benefit of the ruling of this court in the case of *Thiede vs. Utah*, 159 U. S., 510, holding that section 1033 of the Revised Statutes does not relate to practice and

procedure of territorial courts, and to the case of *Good vs. Martin*, 95 U. S., 90, and the case of *Clinton vs. Englebrecht*, 80 U. S., 434; 13 Wall., 434; and your petitioner further shows that by the decision of the United States Circuit Court of Appeals for the Ninth Circuit, section 1024 is erroneously made a statute of procedure in the courts of the Territory of Alaska, instead of the Oregon law adopted for Alaska and above quoted, and that the ruling of the United States Circuit Court of Appeals in this respect is in direct conflict with the act of Congress of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States," chapter 13 of which act is entitled "Certain offenses in the Territories," which chapter permits the joinder in one indictment in the territorial courts of counts relating to polygamy and cohabitation only, section 315 of which act and chapter reads as follows (35 Stat., p. 1149):

"Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment."

And your petitioner further shows that the ruling of the lower court is erroneous and in necessary and direct conflict with numerous rulings of this court and with the ruling of the United States Circuit Court of Appeals for the Eighth Circuit, to the effect that in all prosecutions in the Territories, whether for local offenses or offenses de-

nounced by the general statutes of the United States, the local procedure of the Territory must be followed. The rule relied upon in this petition and the cases above referred to have been most clearly stated in the decision of the Eighth Circuit Court of Appeals above referred to, which is in the following words (the court speaking through Judge Van Devanter):

“It is important therefore to inquire whether the Territorial District Court when exercising the jurisdiction of the circuit and district courts of the United States in the trial of an offense against the laws of the United States should conform to the practice and modes of proceeding in the circuit and district courts of the United States or to those prescribed by the territorial statutes. The question is not new and the answer to it is found in repeated decisions of the Supreme Court of the United States. *Reynolds vs. U. S.*, 98 U. S., 145, 154; 25 L. Ed., 244; *Miles vs. U. S.*, 103 U. S., 304, 310; 26 L. Ed., 481; *Clinton vs. Englebrecht*, 13 Wall., 434, 447; 20 L. Ed., 659; *Hornbuckle vs. Toombs*, 18 Wall., 648; 21 L. Ed., 966; *Good vs. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341. These decisions hold that the territorial courts although expressly clothed with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, are not courts of the United States, but legislative courts of the Territories; that the practice and modes of proceeding, including that of impaneling juries, prescribed for the courts

of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specially provided by some law of the United States."

Cochran vs. U. S., 147 Fed., 206, 207.

Your petitioner further shows that the decision of the lower court is erroneous in that it places Alaska in a different position with reference to the application of the general rule above quoted than that of any other Territory, and is necessarily in conflict with the ruling of this court in the case of "*Interstate Commerce Commission vs. Humboldt Steamship Company*, 224 U. S., 474, holding Alaska to be an organized Territory, and in conflict with numerous decisions of this court cited in said case and found from pages 480 to 485.

Your petitioner further says that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this cause involves important public and constitutional questions which it will be necessary for this court to review, and necessarily involves a conflict between the rulings of this court, the Circuit Court of Appeals for the Ninth Circuit, and the Circuit Court of Appeals of the Eighth Circuit.

Petitioner further shows that the failure to test the indictment in this case by the Oregon law is in direct conflict with the ruling of this court in the case of *Fitzpatrick vs. United States*, 178 U. S., 304; in that case the defendant was prosecuted for

murder under section 5339 of the Revised Statutes, in which case Mr. Justice Brown, in rendering the opinion, used the following language, pages 307-308:

"By section 7 of an act providing a civil government for Alaska, approved May 17, 1884, it is enacted 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable, and not in conflict with the provisions of this act or the laws of the United States.' We are therefore to look to the law of Oregon and the interpretation put thereon by the highest court of that State as they stood on the day this act was passed for the requisites for an indictment for murder, rather than to the rules of the common law."

Petitioner further shows that the Alaska codes subsequently enacted by Congress were simply re-enactments of the laws of Oregon as adopted by the act of 1884 referred to above. As was well stated by Senator Carter in his introduction to the Code of Alaska, "The codes were mainly copied from the statutes from the State of Oregon, and to the end that adjudications by the Supreme Court of that State might remain as directly in point as possible changes were sparingly made in the texts of sections."

The briefs of plaintiff in error in lower court are submitted in support of this petition.

Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal

of this court, directed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the said cause of C. M. Summers, plaintiff in error, *vs.* United States of America, defendant in error, being cause No. 2177 in said Circuit Court of Appeals, to the end that the said cause may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as may seem to this court appropriate and in conformity with the said act, and that the decree of said Circuit Court of Appeals and every part thereof may be reversed by this court.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Lewis P. Shackelford, being first duly sworn, on oath states that he is one of the counsel for C. M. Summers, the petitioner above named, in the cause above named, in the Circuit Court of Appeals for the Ninth Circuit; that he is familiar with the record in said suit, and that he prepared the foregoing petition, and that the allegations thereof are true, as he believes.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me by Lewis P. Shackelford this *31st* day of March, 1913.

L.S. Roswell W. Snow
Notary Public

The undersigned counsel respectfully certifies that the grounds set forth in the foregoing petition are well founded in law.

LEWIS P. SHACKLEFORD,
 ALBERT FINK,
 ALDIS B. BROWNE,
 ALEXANDER BRITTON,
 EVANS BROWNE,
Attorneys for Petitioner.

U.S. Supreme Court, D. C.
FILED.

APR 12 1913

JAMES H. McKENREY,

IN THE

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~1010~~ 502

C. M. SUMMERS, PETITIONER,

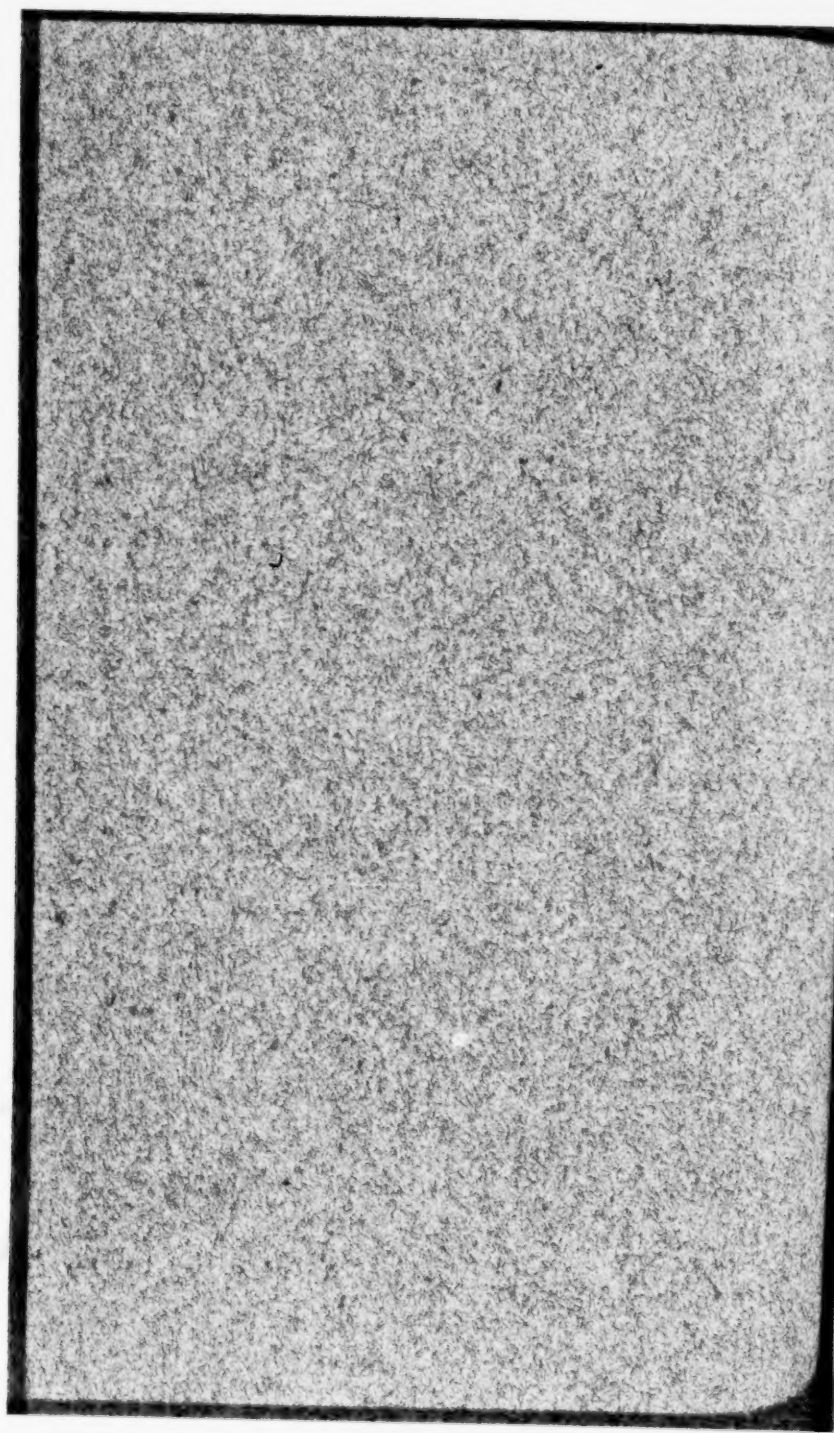
vs.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS INVOLVING THE QUESTION OF CONSTITUTIONAL RIGHT OF DEFENDANT IN CRIMINAL CASES TO JURY TRIAL IN ALASKA AND RIGHT OF DEFENDANT TO THE BENEFIT OF LOCAL TERRITORIAL PROCEDURE IN THE TERRITORY OF ALASKA.

**ALBERT FINK,
LEWIS P. SHACKLEFORD,
ALICE B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
KURNEL R. BABBITT,**

Attorneys for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1912.

No. 1045.

C. M. SUMMERS, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI INVOLVING THE QUESTION OF CONSTITUTIONAL RIGHT OF DEFENDANT IN CRIMINAL CASES TO JURY TRIAL IN ALASKA AND RIGHT OF DEFENDANT TO THE BENEFIT OF LOCAL TERRITORIAL PROCEDURE IN THE TERRITORY OF ALASKA.

In addition to the brief filed in the lower court, a copy of which is filed herewith in support of the petition for rehearing, the following brief, written since the decision of the Circuit Court of Appeals for the Ninth Circuit, is herewith tendered:

No testimony whatever was taken in this case and no trial had, and the defendant was adjudged guilty of the crimes

charged to him in the indictment and sentenced without any trial whatever.

The record presents the following:

1. An indictment charging the defendant with fifty-six separate and distinct crimes under section 5209, relating to the conduct of the affairs of national banks.

2. A demurrer thereto in the language of the Alaska statute, to wit: "that more than one crime is charged in the indictment," based upon the laws of Oregon passed October 19, 1864, and now a part of the Alaska Code, part 2, section 43, which reads as follows:

"That the indictment must charge but one crime and in one form only."

The laws of Oregon were adopted as the laws of Alaska on the 17th day of May, 1884, in an act of Congress entitled "An act providing civil government for Alaska," section 7.

3. An order overruling the demurrer (Tr., p. 163).

4. Refusal of the defendant to further plead (Tr., p. 171).

5. Judgment and sentence adjudging the defendant guilty of each of the crimes charged in the indictment, and sentencing the defendant therefor (Tr., pp. 182 to 185).

6. Judgment of the Circuit Court of Appeals affirming the judgment of the District Court for the District of Alaska last above mentioned (Tr., p. 213).

This record, we respectfully submit, immediately develops two questions:

First. Can a judgment of conviction where there is no plea of guilty, which affirmatively shows that the defendant was not tried by a jury of twelve men, as commanded by the Constitution of the United States, be sustained?

Second. In an organized Territory of the United States, does the local practice and procedure adopted for that Territory constitute the law of the forum with reference to all crimes prosecuted within the Territory?

Before discussing the above questions a few preliminary observations are necessary. In the first place, it will probably be claimed by the United States, as was claimed in the Circuit Court of Appeals, that an affirmance of the decision of the lower court is necessary to the enforcement of substantial judgment.

The case was pending in the lower court, as will be seen by an examination of the transcript, only four months after the indictment was found, when it was removed to the Circuit Court of Appeals. It was argued and submitted at the next session of the Circuit Court of Appeals, and the judgment of affirmance, rendered on the 3d of February, 1913, was entered only thirteen months after the indictment was found. The indictment charged a series of offenses ending in the month of June, 1911, and running back for a period of three years from month to month. A reversal of the case would not have meant defeat to the United States if the Government's case were meritorious, as only one year had elapsed between the finding of the indictment and the time the Circuit Court of Appeals affirmed the proceedings of the lower court. An expeditious hearing of this cause before the Supreme Court of the United States would still leave nearly a year and a half for the charges covered by the indictment as a proper subject for further investigation by the court and grand jury. Practically half of the charges laid in the indictment are still unbarred by the statute of limitations. The judgment of the lower court, each and every part thereof, was duly excepted to at the time the judgment was entered (Tr., p. 185). On the same day that the judgment was entered error was assigned in the entering of the judgment and in the sentence thereunder (Tr., p. 190). Error was of course also assigned in the overruling of the demurrer (Tr.,

p. 190). The proposition that the judgment was erroneous and void and not sustained by the record, owing to the lack of trial in the lower court, was duly presented to the Circuit Court of Appeals, as will be seen from copy of the brief of the plaintiff in error filed herein. (See Brief, pp. 76 and 77.)

FIRST POINT.

THE RECORD IN THIS CASE AFFIRMATIVELY SHOWED THAT THE DEFENDANT WAS CHARGED WITH FIFTY-SIX SERIOUS CRIMES, THAT HE HAS NEVER PLEAD GUILTY TO THE INDICTMENT, THAT HE HAS BEEN CONVICTED WITHOUT TRIAL, AND THAT THIS QUESTION WAS RAISED IN THE CIRCUIT COURT OF APPEALS. THE OPINION OF THE CIRCUIT COURT OF APPEALS SHOWS THAT THE QUESTION OF THE RIGHT TO A JURY TRIAL IN THE TERRITORIES WAS IGNORED BY THAT COURT. (See Tr., pp. 203 to 215.)

Upon this question the following appears to be the state of the law in the Supreme Court of the United States:

In the case of *Callan vs. Wilson*, 127 U. S. (p. 540), the defendant was charged with the crime of conspiracy in the police court of the District of Columbia and convicted by the judgment of that court without a jury and sentenced to a fine of \$25. The defendant appealed his case and then defaulted in the payment of his fine and withdrew the appeal, went to jail and sued out a writ of *habeas corpus* against the United States marshal for the District of Columbia. It was held that the offense with which he was charged was a crime and that the judgment of the lower court was void, not having been supported by the verdict of a jury, and the Supreme Court ordered the discharge of the appellant from custody.

One of the most recent cases upon the question of the right to jury trial is the case of *Schick vs. United States*, 195 U. S., and we find in the opinion of the court, at page 70, the lan-

guage of *Callan vs. Wilson* quoted with approval. The following is the language quoted:

"Except in that class or grade of offenses called 'petty offenses,' which according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, a guarantee of an impartial jury to the accused in a criminal prosecution or by or under the authority of the United States secures to him the right to enjoy that mode of trial from the first moment and in whatever court he is put on trial, for the offense charged."

In the case of *Schick vs. United States*, above cited, the Supreme Court of the United States held that, in a prosecution under section 11 of the oleomargarine act, which reads as follows: ("That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of \$50 for each such offense.") the defendant was really not charged with a crime but with a petty offense; therefore, under the ruling in the case of *Callan vs. Wilson*, *supra*, a jury may be waived. Mr. Justice Brewer in his opinion further discusses the provisions of the Constitution with reference to jury trial and demonstrates that the original draft of the Constitution as reported to the convention provided as follows:

"The trial of all criminal offenses shall be by jury,"

and shows that by unanimous vote the draft of the Constitution was amended so as to read "The trial of all crimes," and under the peculiar circumstances of that case, which simply involved the payment of a fine of \$50, it was held that the defendants were charged with a petty offense only.

It will be seen also that the question involved herein is one that this court will require to be discussed. We quote from the *Schick* case:

"In each case the parties in writing waived a jury, and agreed to submit the issues to the court.

"The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect was suggested by this court and briefs called for from the respective parties."

It is unnecessary to discuss at length the case of *Rasmussen vs. United States*, 197 U. S., 516. It is sufficient to say that the act of Congress providing a criminal code for Alaska was declared unconstitutional in so far as it reduced the number of jurors required for the trial of a misdemeanor from twelve to six.

The decision in the case of *Thompson vs. Utah*, 170 U. S., 343, is determinative of the question involved in this case.

While we ask an examination of all these authorities, we take the liberty of quoting the following language from that opinion:

"It is said that the accused did not object until after verdict to trial by jury composed of eight persons; therefore he should not be heard to say that his trial by such jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of accused felon, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt."

We especially ask the court to read in this connection also the case of *Cancemi vs. People*, 18 N. Y., 131. In this case one of the twelve jurors was withdrawn upon the express consent and stipulation of the prisoner and he was tried by eleven jurors. Among other things, in discussing the case, the court said the following:

"If the deficiency of one juror may be waived there appears to be no good reason why a deficiency of eleven might not be and it is difficult to see why the entire panel might not be dispensed with and the trial committed to the court alone."

In discussing the early English cases, the court used the following language:

"The opinion of the judges in the court of the King's Bench in the case of Lord Dacres, tried in the reign of Henry VIII for treason, strongly fortified the conclusion above expressed. One question in the case was whether a prisoner might waive a trial by his peers and be tried by the country, and the judges agreed that he could not, for the statute of Magna Charta was in the negative and prosecution was at the King's suit. Woodeson in his lectures (vol. 1, p. 346) says the same question was resolved on the arraignment of Lord Sudley in the seventh year of the reign of Charles I, and that the reason was that the mode of trial was not so broadly a privilege of the nobility as a part of the law of the land, like the trial of commoners by commoners enacted or rather declared by Magna Charta. In 3 Inst. 30 the doctrine is stated that 'a nobleman cannot waive his trial by his peers and put himself upon the trial of the country, that is, of twelve freeholders; for the statute of Magna Charta is that he must be tried *per pares*,' and so it was resolved in Lord Dacres' case."

A lengthy brief, citing the cases in which the question now being discussed is involved, is unnecessary, for the reason that the matter is thoroughly digested in a most exhaustive footnote to the case of *Re McQuown*, found in the 11th L. R. A., new series, at page 1136. The following is the statement of the digester:

"Although the contrary has been asserted many times, yet, when confined to cases involving the waiver, by one charged with a crime, of a trial by jury, as distinguished from other questions, such as consenting to trial by a less number of jurors than provided by the Constitution, the waiver of the disqualification of certain jurors and the like, *the proposition may be safely asserted that the courts are unanimous in holding that, as to felonies, in the absence of statutory authority, a defendant cannot waive a jury trial, and an attempt to do so, followed by a trial before the court without a jury, will be of no avail, and a judgment rendered by the court will be erroneous if not void.*"

In the note above quoted are collected all of these cases

bearing upon the subject. The decision of the Circuit Court of Appeals for the First Circuit in the case of *Kelleher vs. United States*, 193 Fed., 8, settles without question the proposition that a violation of the National Banking Act, with which defendant in this case is charged, is a felony, since the passage of the penal code act of March, 1909 (35 Statutes-at-Large, page 1088).

We respectfully submit that, in view of the fact that the question involved in this case must arise now or later upon *habeas corpus*, as in *Callan vs. Wilson*, that the questions involved herein be brought to this court expeditiously by writ of certiorari, so the defendant may be re-indicted within the period of limitations if the United States have a meritorious case.

SECOND POINT.

SECTION 1024 OF THE REVISED STATUTES OF THE UNITED STATES HAS NO APPLICATION TO THE TERRITORIES. GENERAL STATUTES OF PROCEDURE FOUND IN THE REVISED STATUTES OF THE UNITED STATES WERE NOT INTENDED TO APPLY TO THE TERRITORIES, AND BY THE DECISIONS OF THIS COURT IT IS TO BE PRESUMED THAT THEY DO NOT APPLY TO TERRITORIAL COURTS UNLESS A SPECIFIC INTENTION TO THAT END IS EXPRESSED IN THE STATUTE.

We respectfully submit that the opinion of the Circuit Court of Appeals shows upon its face that the Circuit Court of Appeals entertains a grave doubt as to whether section 1024 applies to the Territories, but that the position taken by that court in its opinion is that it cannot be said that section 1024 *does not* apply to the Territories.

That is to say, in discussing the case the burden was thrown on the plaintiff in error to show conclusively that section 1024 did not apply to the Territories. We believe the rule to be that general statutes of procedure passed by Congress without specifically mentioning the Territories must

be presumed to apply only to United States circuit and district courts and not to territorial courts. This was the question discussed in the case of *Clinton vs. Englebrecht*, 80 U. S., 434, wherein the court used the following language:

"The regulations of that act (referring to the Judiciary Act) requiring the selection of jurors had no reference whatever to the territories. They were framed in reference to the States and cannot without violence to the rules of construction be made to apply to the Territories of the United States. If, then, this subject was not regulated by territorial law it would be difficult to say that the selection of jurors had been provided for at all in the Territories."

In the case of *Good vs. Martin*, 95 U. S., 90, the Supreme Court of the United States used the following language:

"Territorial courts are not courts of the United States, within the meaning of the Constitution, as appears by all the authorities: '*Clinton et al. vs. Englebrecht*, 13 Wall., 434; '*Hornbuckle vs. Toombs*, 18 Wall., 648.' A witness in civil cases cannot be excluded in courts of the United States *because* he or she is a party to or interested in the courts of a Territory where a different rule prevails."

We take the liberty of asking this court, by comparing section 1024, which is under discussion in this case with section 858, which was under discussion in the case of *Good vs. Martin*, what distinction can be pointed out showing an intention to limit the application of section 858 on the part of Congress to a narrower application than that which would be attributed to section 1024.

We desire to ask this question also: How can the case of *Thiede vs. Utah*, 159 U. S., 510, be distinguished from the case at bar?

In the Thiede case the courts were dealing with the application of section 1033 of the Revised Statutes. Section 1033 does not refer to courts of the United States or to any other court but simply provides a rule of procedure in capital

and treason cases. It (section 1033) *is more general in its application and more general in its scope of language than Section 1024*. In discussing the Thiede case the Supreme Court of the United States used the following language:

"By 1033 Revised Statutes the defendant in a capital case is entitled to have delivered to him, at least two entire days before the trial, a copy of the indictment and a list of the witnesses to be produced on the trial. *Logan vs. United States*, 144 U. S., 263. But this section applies to circuit and district courts of the United States and does not control the practice and procedure of the courts of Utah which are regulated by the statutes of that Territory. This question was fully considered in *Hornbuckle vs. Toombs*, 18 Wall., 648, and it was held, overruling prior decisions, that the pleadings and procedure of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of territorial assemblies and the regulations which might be adopted by the courts themselves. See also *Clinton vs. Englebrecht*, 13 Wall., 434, in which it was held that the selection of jurors in the territorial court was to be made in conformity to the territorial statutes; *Gould vs. Martin*, 95 U. S., 90, in which a later ruling was made as to the competency of witnesses against *Reynolds vs. United States*, 98 U. S., 145, where the same rule was applied to the impanelling of grand jurors and the number of jurors. Also *Miles vs. United States*, 103 U. S., 304, a case coming from the Territory of Utah, in which the same doctrine was applied in regard to the mode of challenging petit jurors."

The reason we say above that 1033 is more general in its scope than 1024 is this: 1024 was passed under a title and preamble that showed an intention to have 1024 apply only to United States circuit and district courts *in the several States*, and that subsequent legislation showed that the act which contained 1024, in so far as fee provisions were concerned, was extended only to certain Territories *named* in subsequent legislation of Congress. It is admitted in the

opinion of the Circuit Court of Appeals that the Territories named were not all the Territories then in existence.

The statute from which section 1033 was drawn is found at page 112, volume 1, of the Statutes at Large, entitled as follows:

"Chapter 9. An act for the punishment of certain crimes against the United States."

The first section denounces the levying of war against the United States by persons owing allegiance thereto. The second section refers to the same subject. The third section reads as follows:

"And be it further enacted, That if any persons or person shall within any fort, dock-yard, magazine, or in any other place or district or country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death."

This is the very section under which Fitzpatrick was successfully prosecuted for murder in the case of *Fitzpatrick vs. United States*, 178 U. S., 304, the murder having been committed in the District of Alaska, the Supreme Court holding that the procedure was controlled by the Oregon statute, although the murderer was punishable under the act just quoted. Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 denounced the crime of misprision, of felony, of manslaughter, piracy, maiming, forgery, stealing, larceny, receiving stolen goods, perjury, bribery, obstruction of process, rescue of convicted persons, and like crimes. None of these crimes are limited in their application to the territorial limits of the States, and without doubt apply to the Territories. *Section 29 of this act is the section that is now section 1033 of the Revised Statutes, which was discussed in the Thiede case and held inapplicable to the Territories.* We have been unable to find in the act any expression limiting the provisions of the act to proceedings in the United States circuit and district

courts. Nevertheless the Supreme Court of the United States held that in the section which concerned procedure the act must be considered as having been intended to furnish a rule of procedure for United States circuit and district courts in the States only as distinguished from courts of the Territories. How, then, can this court hold section 1024 to apply to the Territory without disregarding the entire process of reasoning applied in the case of *Thiede vs. Utah, supra*. It seems to us that this is a parallel and deserves the most serious consideration if the doctrine of *stare decisis* has any real sanctity. We respectfully request the court to examine the act construed in the Thiede case and found as above cited, page 112, volume 1, of the United States Statutes at Large.

We feel sure that a reconsideration of the present case can lead to nothing but the best results. The case was argued briefly and the argument did not develop fully the basic principle involved in all of the rulings of the Supreme Court cited by the plaintiff in error, namely, that the statutes of procedure of the United States are not really in conflict with the statutes adopted for the Territories, because, while they may set up a different procedure, they are intended to apply to different courts. An examination of all the cases last cited and all of the cases heretofore decided in the Circuit Court of Appeals for the Ninth Circuit will show without question that the real reason assigned in each instance was that the general statutes of procedure in the United States were intended to regulate forums other than the territorial courts. If section 1024 is to be considered not as a special statute intended to apply to territorial courts, but as an ordinary statute of procedure, then it would be considered to apply only to United States circuit and district courts.

There is, however, another matter which was not discussed in the opinion of the Circuit Court of Appeals and which, perhaps, was not sufficiently discussed in the brief of the petitioner when the case was submitted, namely, the act of Congress approved March 4, 1909, known as the new Penal

Code, 35 Statutes at Large, page 1088. In view of the seriousness and importance of this case, we take the liberty of copying the first four sections of chapter 13 of that act:

"CHAPTER THIRTEEN.

"Certain Offenses in the Territories.

"SECTION 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or district, or within or upon any place within the exclusive jurisdiction of the United States.

"SECTION 312. Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise have in his possession for any such purpose any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.

"SECTION 313. Every person who has a husband or wife living, who marries, another, whether married or single, or any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been ab-

sent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

"SECTION 314. If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.

"SECTION 315. *Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment.*"

Can it be said that the paragraph above referred to, which permits the joinder of counts in an indictment only of certain specified offenses in the Territory, does not impliedly prohibit the joinder of any other offenses? Can it be said that the section of the statute referred to, italicized above, was entirely unnecessary?

The lower court, in assuming that section 1024 (which relates to the fee system in so far only as the conduct of district attorneys is concerned,) was impliedly extended to Alaska with the fee system, has overlooked a most important consideration, to wit, the Circuit Court of Appeals has completely ignored the provisions of the act of May 17, 1884, creating a civil government for Alaska, section 9, of Statutes at Large, pages 25 to 27, which provides as follows:

"They shall receive respectively the following salaries: the governor the sum of three thousand dollars, the attorney the sum of two thousand five hundred dollars."

At no time has the United States attorney been upon the fee system in the District of Alaska.

All through the statutes of the United States at the time they were enacted and at the time they were revised, we

submit that the following custom is apparent, to wit, whenever a statute of procedure is passed it presumably affects only the procedure in the United States circuit and district courts, unless Congress gives expression to a deliberate intention to have the statute apply also to the Territories. There is no better example of such custom than the act of July 22, 1813, which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever there shall be several actions or processes against persons who might legally be joined in one action or process, touching any demand or matter in dispute before a court of the United States OR OF THE TERRITORIES THEREOF, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action or process, unless special cause for several actions or processes shall be satisfactorily shown on motion in open court.

*"SECTION 2. Be it further enacted, That whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one libel before a court of the United States or of THE TERRITORIES THEREOF, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid. And in proceedings on several libels or informations against any cargo or parts of cargo or merchandise seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned; but allowance may be made on one libel or information for the costs incidental to several claims: *Provided, That* in case of a claim of any vessel or other property seized on behalf of the United States and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same upon paying only his own costs.*

"SECTION 3. *And be it further enacted*, That whenever causes of like nature or relative to the same question shall be pending before a court of the United States OR OF THE TERRITORIES THEREOF, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States OR OF THE TERRITORIES THEREOF, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

"Approved, July 22, 1813."

An examination of the Revised Statutes of the United States will show numerous other sections in which Congress has been careful to apply certain methods of procedure (*by specific enactment*) to the Territories.

We respectfully submit that the record of this case presents the very question presented in the case of *Cochran vs. The United States*, quoted at pages 6 and 7 of the petition for writ of certiorari, and that although the lower court has given to us a painstaking, laborious, and refined effort to differentiate this case from the cases cited by Mr. Justice Van Devanter in the case of *Cochran vs. United States*, nevertheless, the real question involved in this case is the question decided by Mr. Justice Van Devanter in the *Cochran* case. Furthermore, the Circuit Court of Appeals has reverted in its opinion to the case of *Paige vs. Burnstine*, 102 U. S., 664, as the authority supporting its decision herein. The Supreme Court of the United States in its opinion of the *Burnstine* case expressly disavowed its application to the Territories, and the Circuit Court of Appeals for the Ninth Circuit, long after the decision in the *Burnstine* case, in the

case of *Corbus vs. Leonhardt*, 114 Federal, p. 10, referring to the case of *Paige vs. Burnstine*, used the following language:

"*Paige vs. Burnstine*, 102 U. S., p. 664; 26 L. Ed., 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered certain provisions providing government for the District of Columbia which are not applicable to Alaska."

The Circuit Court of Appeals, in the opinion in the *Corbus* case, then proceeds to quote the language of this court, which disavows the application of *Paige vs. Burnstine* to the Territories.

The question involved in this case is, Was section 1024 of the Revised Statutes of the United States adopted as a part of the law of procedure in the courts of the Territory of Alaska on the 17th of May, 1884, or was the Oregon law prohibiting the statement of more than one crime in the indictment adopted at that date? There is no serious contention to the effect that the criminal code of procedure for Alaska, passed March 3, 1899, was intended to change the law as it existed at that time, for section 1 of part 2 of that act simply applied procedure of part 2 to the crimes designated in title 1, but did not repeal the procedure which legally prevailed before that time with reference to the prosecution of offenses against the general laws of the United States, which procedure was settled to be under the Oregon law, in the case of *Fitzpatrick vs. United States*, 178 U. S., p. 304.

We submit, that the judgment of the lower court is void for want of actual trial, a question which naturally brings this case into this court either now or later; and further, that upon the question of procedure all of the previous decisions of this court from *Clinton vs. Englebrecht*, 13 Wall., p. 434, (1872), to *Fitzpatrick vs. United States*, 178 U. S., p. 304, (1900), have, in effect, been reversed by the lower court in this case.

We submit, the writ in this case should be granted and the cause promptly reversed, so that the Government will have ample time within the period of the statute of limitations to proceed against the petitioner in accordance with the law.

Respectfully submitted,

ALBERT FINK,
LEWIS P. SHACKLEFORD,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
KURNEL R. BABBITT.

Attorneys for Petitioner

502
No. ~~1-45~~

9

IN THE

United States Circuit Court of Appeals

Office Supreme Court, U. S.
FILED

APR 5 1913

J. H. KENNEY
CLERK

No. 2177.

C. M. SUMMERS, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA, DEFENDANT
IN ERROR.

UPON WRIT OF ERROR FROM THE DISTRICT COURT OF THE
DISTRICT OF ALASKA, DIVISION NUMBER ONE.

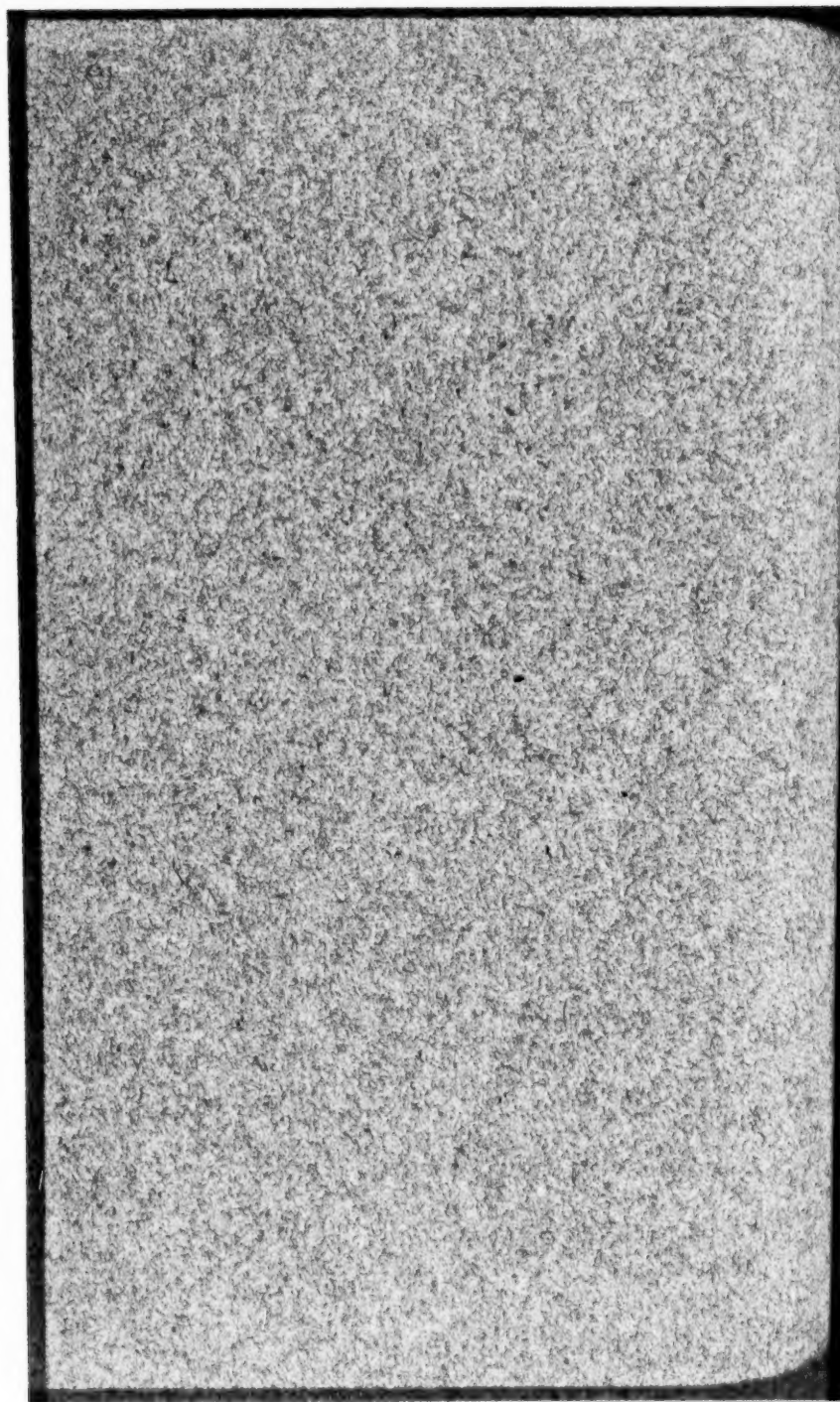
BRIEF OF PLAINTIFF IN ERROR.

L. P. SHACKLEFORD,
SHACKLEFORD & BAYLESS,
Attorneys for Plaintiff in Error.

Filed this day of A. D. 1912.

Clerk.

By Deputy Clerk.



SYLLABUS INDEX TO BRIEF.

	Page
<i>Indictment in this case charged the defendant with fifty-six separate and distinct crimes under section 5209 of the Revised Statutes relating to national banks.</i>	1-2
<i>Defendant demurred to the indictment on the ground that the same violated the Alaska statute prohibiting the statement of more than one crime in one indictment. See earlier's Alaska Code, p. 52, sec. 43. This demurrer was overruled and the defendant elected to stand upon his demurrer and refused to plead further, was adjudged guilty of each one of the fifty-three separate and distinct crimes charged against him in the indictment and sentenced accordingly, without trial, in accordance with section 97, Alaska Code Criminal Procedure.</i>	2-3
<i>The question involved in the case is as to whether section 1024 of the Revised Statutes, providing for joinder of separate offenses in an indictment, or section 43 of the Alaska Code of Criminal Procedure controls in the District of Alaska.</i>	7
1. Section 1024 of the Revised Statutes first became a law of the United States by virtue of act of Congress of February 26, 1853, 10 Stats. at Large, pp. 161-9. The scope of the act was to regulate fees and costs of clerks, marshals, and attorneys of the "circuit and district courts of the United States" in "the several States." This act was inoperative in the Territories and in Alaska.	8

- a. Because Alaska is not a circuit or district court of the United States. See *McAllister vs. U. S.*, 141 U. S., 174; *The Coquitlam*, 163 U. S., 346; *Corbus vs. Leonhardt*, 114 Fed., p. 10; *U. S. vs. Ball*, 147 Fed., 36....
- b. To further show that the act of February 26, 1853, had no application to the Territories, chapter 175, Statutes at Large, vol. 10, p. 671, is cited, wherein the operation of the statute with reference to the schedule of fees was specifically extended to three Territories, to wit, Minnesota, Utah, and New Mexico; also 22 Statutes at Large, p. 344, extending the operation of act of February 26, 1853, to Territories of New Mexico and Arizona after the creation of Arizona, and also 22 Statutes at Large, p. 344, extending the fees provided for in the act to the compensation of the clerk of the Supreme Court of the District of Columbia, and also section 9, act of May 17, 1884, which did *not* extend the act of 1853 to the district of Alaska.....
- c. Between 1851 and 1878 all States and Territories west of the continental divide adopted statutes prohibiting the joinder of more than one offense in an indictment. The States and Territories referred to are Arizona, California, Idaho, Montana, Nevada, Utah, Washington and Oregon....
- d. March 22, 1882, realizing that joinder of offenses was not permitted in the Western States and Territories, when Congress passed the Edmonds Act (Statutes at Large, vol. 22, p. 31), wherein by section 4 it specially permitted the joinder of polyg-

Pa

15

18

- any and kindred offenses in the Territories. The same provision was re-enacted March 4, 1909, in the "Crimes Act," under chapter entitled "Certain Offenses in the Territory." No provision is made anywhere in Federal law for the joinder of any other offenses than those just named in the Territory..... 19
2. By act of May 17, 1884, the general laws of the State of Oregon were declared to be the law in the District of Alaska. The adoption of the laws of another State as the laws of a Territory is not unusual, as in Oklahoma and Indian Territory. The effect of such adoption is to give to those laws the same scope, force, and effect as if they had been adopted by a legislative assembly of the Territory. *United States vs. Pridgeon*, 153 U. S., 48..... 20
3. That the practice of the territorial courts is regulated by the local territorial laws, and not by the general procedure applicable to the Federal courts, was settled beyond all further question before the passage of the act of May 17, 1884, providing civil government for Alaska..... 25
- (1872) *Clinton vs. Englebrecht*;
 (1874) *Hornbuckle vs. Toombs*, 85 U. S., 648 (in which all previous contrary questions expressly overruled);
 (1879) *Good vs. Martin*, 95 U. S., 90;
 (1881) *Reynolds vs. U. S.*, 98 U. S., 145;
 (1881) *Miles vs. U. S.*, 304.. Discussed.
 This rule has continued in full force ever since.

- (1885) *Thiede vs. Utah*, 159 U. S., 510;
Welty vs. U. S., 76 Pacific, 121;
U. S. vs. Haskell, 169 Fed., 449;
- (1906) *Cochran vs. U. S.*, 147 Fed., 206
 (opinion by Mr. Justice Van
 Devanter), holding that doc-
 trine applies even where the
 prosecution is under a general
 law of the United States as
 distinguished from a local or
 territorial law. 28
4. Decisions applicable to Alaska are uni-
 form to the effect that the criminal proceed-
 ure of Oregon adopted by the act of 1884
 controls in the District of Alaska. 30
- (1891) *U. S. vs. Clark*, 46 Fed., 633 (ap-
 plying Oregon procedure to
 prosecution for murder under
 general laws of the United
 States applicable to Terri-
 tories);
- (1900) *U. S. vs. Jackson*, 102 Fed., 43,
 C. C. A. 9th Circuit;
- (1902) *Corbus vs. Leonhardt*, 114 Fed.,
 10, C. C. A. 9th Circuit;
- (1900) And finally *Fitzpatrick vs.*
United States, 178 U. S., 304.
 Decision by Mr. Justice Brown
 that sufficiency of indictment
 must be tested by laws of
 Oregon.
5. The same construction has been placed
 upon the new Alaska Criminal Code and
 Code of Procedure by the Circuit Court of
 Appeals for the Ninth Circuit in a criminal
 case arising subsequent to March 3, 1899.
 See *Ball vs. U. S.* (1906), 147 Fed., 36. 32

6. The proper interpretation of the Alaska Code of 1899:

Section 10 of the Alaska Code of Criminal Procedure reads as follows:

The lower court construes section 10 to read as follows:

"Sec. 10. Grand jury, how selected and summoned.—That grand juries to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected and summoned, and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in title one of this act as those that are defined in other laws of the United States."

(1) "That the grand juries, to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected and summoned in the manner prescribed by the laws of the United States district and circuit courts; and (2) grand juries to inquire of crimes defined in other laws of the United States, committed or triable within said district, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; (3) the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in title one of this act as those that are defined in other laws of the United States."

Page .

After having attributed to section 10 the meaning set forth above, on the right-hand side of the page, the lower court proceeds to hold that this construction is necessary in order to reconcile it with section 1, part II, which is as follows:

"Sec. 1. Crimes and offenses, how prosecuted.—That proceedings for the punishment and prevention of the crimes defined in title I of this act shall be conducted in the manner herein provided" 35-40

It further holds that the phrase, "proceedings of the grand jury," shall be used as a modifying phrase only to that portion of section 10 which refers to prosecutions under other laws of the United States. It then proceeds to the sweeping conclusion that by the act of March 3, 1899, Congress intended to build up in Alaska a system of dual procedure. 40

a. Giving to section 1, part II, act of May, 1899, its widest reasonable scope, namely, that the procedure provided therein only applies to the crimes defined in title I, then the procedure for the punishment of other crimes than those defined in title I would be as it had been before the passage of the act, and the indictment must be tested in accordance with the Oregon law in effect May 17, 1884, which prohibits the statement of more than one crime in one indictment. . . 40

b. For the sake of argument, conceding the construction placed upon section 10 by the lower court, the phrase, "proceedings of grand juries," refers only to the rules governing the conduct of its sessions as a deliberative body, and the scope of the phrase is not sufficient to justify the assumption of a dual system of court procedure. Citing 20 Cyc., 1293; vol. 10, Ency. Pl. & Pr., 344; 24 Cent. Digest, columns 2752-3. 40

(That is to say, the lower court has reached an erroneous conclusion by confounding the words, "proceedings of grand jury," with the criminal procedure and giving to them the same scope). 40

- c. The act of March 3, 1899, did not create a dual system of procedure, but simply consolidated the Oregon law and certain features of the Federal statutes into one system of procedure. 45

Section 10, upon the construction of which the opinion of the lower court turns, did not copy the laws of Oregon, for the reason that juries in Oregon, under the constitution and statutes, were drawn from counties, and no county government ever existed in Alaska, but the adoption of section 10 did not change the pre-existing practice as laid down by Judge Deady in *Kie vs. U. S.*, 27 Fed., 351.

- d. The enacting clause of the act of 1899 shows an intention on the part of Congress to have the procedure laid down in that act apply to all prosecutions of whatever nature. Section 1, part II, of the Code should be controlled by it, but either the introductory words of part I or part II should be seriously considered so as to impair the plain meaning of the rest of the act, for the reason they are really in the nature of preambles, having been tacked onto the act after the deliberated work of codification had been completed. Citing Black on Interpretation of Laws, sec. 77. .54-55

- e. The theory adopted by the lower court in its opinion ignores the plain meaning of the words of section 10, and there is nothing to support the ingenious, but revolutionary, theory that thereby a dual system of procedure was adopted in the District of Alaska. 56

- f.* If this court sustains the decision of the lower court, it is forced to reach the unnatural conclusion that by the act of March 3, 1899, Congress intended to make Alaska an exception to the universal rule in the other Territories, to the effect that the local procedure controlled whenever in conflict with the general laws relating to Federal procedure 57-58

There is nothing in the statute to justify the assumption that the application of *Hornbuckle vs. Toombs* and *Fitzpatrick vs. U. S.* should not still apply to Alaska 57-58

- g.* The opinion of the lower court completely ignores the basic rules of presumption against change in the law and against implied repeal. Citing *Jackson vs. U. S.* (District of Columbia), decided March, 1912; Black on Interpretation of Laws, secs. 52-53. 58-62

- h.* The decision of the lower court completely ignores the doctrine laid down by Senator Carter in the introduction to his Code and by this court in the case of *Tyee Co. vs. Jennings*, 137 Fed., 863, and that of Mr. Paul Charlton in his codification of 1906, to the effect that the new Alaska Codes of 1899 and 1900 are to be construed as simply a compilation, and that it was the intention of Congress to change the pre-existing law as little as possible. See introduction to Carter's Code, also Introduction to The Department Compilation, 1906 62-68

6. The doctrine of the lower court, that by virtue of sections 1 and 10, part II, act of March, 1899, there should be read into the Alaska Criminal Procedure a dual system of procedure, and that section 1024 was impliedly made a part of the Alaska law, violates the construction placed upon those sections by Senator Carter and Mr. Charlton in the annotations made by them at the time they completed their respective compilations. See annotation in Carter's Code, part II, sec. 10; also The Department Compilation, 1906. 68-72
7. If this court affirms the opinion of the lower court with reference to joinder of crimes in the indictment, it must do so by adopting the restrictive construction placed upon section 1, part II, act of 1899, and in such case the application devolves upon this court to adopt a *like* restrictive construction with reference to the introductory words to part I, and this court will be compelled, therefore, to hold that section 5209 was not a crime in the district after March 3, 1899. 74
8. The Government is not in a position to claim an affirmance of the judgment in this case, the defendant having been sentenced *without trial* in accordance with the provisions of the Alaska Code of Criminal Procedure, according to provisions of section 97, Alaska Code of Criminal Procedure, for the reason that the only doctrine through which they can obtain an affirmance is the doctrine that Federal procedure, and not local procedure, applies to the enforcement of section 5209 in the District of Alaska. 76

IN THE
United States Circuit Court of Appeals.

No. 2177.

C. M. SUMMERS, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA, DEFENDANT
IN ERROR.

UPON WRIT OF ERROR FROM THE DISTRICT COURT OF THE
DISTRICT OF ALASKA, DIVISION NUMBER ONE.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Case.

An indictment was returned against the plaintiff in error and filed in the District Court for the District of Alaska, Division No. One, on the 5th of January, 1912, charging the defendant and one

Stewart G. Holt with violations of section 5209 of the Revised Statutes. This indictment contained fifty-six separate counts charging the defendants and each of them with fifty-six separate and distinct crimes. The first twenty-five counts charged the defendants with twenty-five distinct and separate crimes against section 5209 of the Revised Statutes of the United States in making false entries in the books of the First National Bank of Juneau, Alaska. The transactions charged in the first twenty-five counts covered a period of two years. Counts 26 to 53, inclusive, charged separate and distinct offenses, covering a period of about three years, and related to alleged false entries in the reports to the Comptroller of the Currency. Counts 54, 55, and 56 charged separate and distinct misapplications and abstractions of funds from the First National Bank.

On the 8th day of January, 1912, the plaintiff in error interposed his demurrer to the said indictment, demurring to the indictment as a whole and to each and every count of the indictment, among other grounds, upon the following grounds:

a. That the indictment did not conform to the provisions of chapter 7, title 2, of the Act of Congress, approved March 3, 1899, providing a Code of Civil Procedure for the district of Alaska, and particularly to section 43, title 2, of said act.

Section 43, title 2, of said act reads as follows (see Carter's Alaska Code, p. 52):

"SEC. 43. *Indictments must charge but one crime and in one form.*—That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by the use of different means the indictment may allege the means and the alternative."

The foregoing section was adopted by the legislature of Oregon on the 19th day of October, 1864 (see Carter's Alaska Code, p. 52), and was adopted as one of the laws of Alaska on the 17th day of May, 1884 (see Carter's Code, p. 441, sec. 7).

b. More than one crime was charged in the indictment.

c. That neither do the facts stated in the indictment nor in any count thereof constitute a crime.

d. That the grand jury by which said indictment was found had no legal authority to inquire into the crime charged, because the same is not triable within the district. (For copy of demurrer, see Tr., pp. 142-3.) This demurrer was overruled and the plaintiff in error allowed his exceptions. (See Tr., p. 143.) Plaintiff in the meantime gave bail in the form and manner prescribed in the Alaska Code of Criminal Procedure. (See Tr., p. 140.)

The decision of the court upon some of the questions involved in the ruling upon this demurrer was

afterwards reduced to writing in the form of an opinion by the court in the case of *The United States of America, plaintiff, vs. North Pacific Wharves and Trading Company et al., defendants*. We assume that the United States attorney will print this opinion as a part of his brief, but a copy of the same is filed with the clerk of this court for reference in case it is not otherwise brought into the record.

Later and in the month of May, 1912, the plaintiff in error by permission of the court withdrew his plea of not guilty, which had been entered after the overruling of the demurrer, and renewed his demurrer to the indictment (see Tr., p. 163), and after consideration the court again overruled the demurrer of the plaintiff in error and allowed the plaintiff in error his exceptions. (Tr., pp. 163-4.) Thereupon the defendant elected under section 97 of the Alaska Code of Criminal Procedure to stand upon his demurrer and declined to plead further. (Tr., pp. 181-2.) Pursuant to section 97, the court thereupon, without trial, entered a judgment, finding the defendant guilty of each and every one of the fifty-six separate crimes charged in the indictment, and sentenced the defendant to five years' imprisonment under each and every one of the counts in the indictment, and provided that service of the sentence under each and every one of the counts might be concurrent. (Tr., pp. 182-5.)

Upon reargument of the demurrer the record in this case was made so as to clearly and succinctly

present to this court under a short record the vital questions involved in this case, which are as follows:

1. Is section 1024 of the Revised Statutes of the United States, permitting joinder of separate offenses, applicable to the District of Alaska, or does the Act of October 19, 1864, of the laws of Oregon, adopted May 17, 1884, as the law of Alaska and now embodied in section 43 of the Alaska Criminal Code of Procedure, prohibiting the joinder of offenses, control?

2. Is section 5209 of the Revised Statutes in effect in Alaska, and is a violation of that section a crime committed when within the district of Alaska, or has a grand jury in the district of Alaska legal authority to inquire into such a charge?

3. Upon the record in this case, can the judgment of the lower court be sustained?

After the entry of the judgment due proceedings were had and plaintiff in error sued out his writ to this court and bail bond was given upon appeal in the manner and form required by the Alaska Code of Criminal Procedure. (See Tr., p. 185; Carter's Code of Alaska, chap. 22, pp. 79-83.) In fact, all of the proceedings disclosed by this record were in strict conformity with the Alaska Criminal Code of Procedure except the indictment, which is

drawn in accordance with the practice in the United States circuit and district courts.

Specification of Errors.

I.

The court erred in overruling the demurrer of the defendant to the effect that the indictment did not substantially conform to the requirements of chapter 7, title 2, of the Alaska Code, and particularly to section 43 of said chapter, and also in overruling the third ground of demurrer that more than one crime was charged in the indictment. (See Tr., pp. 189-190.)

II.

The court erred in overruling the demurrer of the plaintiff in error to each and every one of the counts in said indictment, in that they did not, nor did any of them, state a crime. (Tr., pp. 189-190.)

III.

The court erred in giving and entering judgment against the defendant upon the record herein. (Tr., pp. 189-190).

BRIEF AND ARGUMENT.

First Specification of Error.

The first specification of error distinctly raises the following question: Does section 1024 of the Revised Statutes, permitting joinder of separate offenses, apply to the proceedings of a district court for the district of Alaska, or does the provision prohibiting joinder of offenses adopted from the laws of Oregon, May 17, 1884, and found in the Criminal Code of Procedure of Alaska, section 43, control?

This discussion may be divided into several propositions. Our first proposition is as follows:

First. SECTION 1024, REVISED STATUTES, WAS NEVER INTENDED TO APPLY TO TERRITORIAL COURTS, BUT WAS INTENDED TO APPLY ONLY TO UNITED STATES CIRCUIT AND DISTRICT COURTS.

Section 1024 of the Revised Statutes of the United States reads as follows:

"SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two

or more indictments are found in such cases the court may order them to be consolidated."

This section is in direct conflict with the specific legislation relating to procedure in Alaska, which is as follows:

"Indictment must charge but one crime and in one form. That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by the use of different means the indictment may allege the means and the alternative."

See laws of Oregon, act October 19, 1864; sec. 7, U. S. act of May 17, 1884; Carter's Alaska Code, p. 441; sec. 43, part 2, Carter's Alaska Code, p. 52.

Section 1024 of the Revised Statutes of the United States first became a law of the United States through the enactment of chapter 80 of the United States Statutes at Large of 1853 (act of February 26). (See vol. 10, U. S. Stat. at Large, pp. 161 and 169.)

The act is entitled as follows:

"An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes."

The enacting clause is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of

America, in Congress assembled, That in lieu of compensation now allowed by law to attorneys, solicitors and proctors in the United States courts, United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners and printers in the several States, the following and no other compensation shall be taxed and allowed."

Section 1 of the act provides schedule of fees for United States attorneys, clerks, and marshals, and also contains the exact language of section 1024 of the Revised Statutes. The act has to do with the accounting of various officers for their fees and expenses and with schedules of fees of commissioners and witnesses.

The provisions of the act show without question, not only from the title but from the body, that it has no general application except to constitutional courts, and would have no application unless specially extended to any of the territorial courts.

(a) The District Court of Alaska is not a circuit or district court of the United States.

The Supreme Court of the United States in the case of

McAllister vs. United States, 141 U. S., 174,

held (shortly after civil government was extended to Alaska) that the District Court for the District of Alaska was not a court of the United States.

Following this decision, some ten years later this court certified to the Supreme Court of the United States, in the case of

The Coquitlam, 168 U. S., 346,

the question as to whether the District Court for the District of Alaska, when exercising its criminal admiralty jurisdiction, was a district court of the United States within the meaning of the act allowing appeals to the Circuit Court of Appeals, and the Supreme Court of the United States held that it was not, but treated the District Court of Alaska purely and simply as a territorial court, even when exercising its admiralty jurisdiction. In this connection the court uses the following language:

"The district and circuit courts mentioned in the act of 1891, and whose final judgment may be reviewed by the circuit courts of appeal, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely: constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited, and the judges of which are entitled, by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. *American Ins. Co. vs. 356 Bales of Cotton*, 26 U. S.;

1 Pet., 511, 546 (7:242, 256); *Benner vs. Porter*, 50 U. S.; 9 How., 235, 242 (13:119, 122); *Clinton vs. Englebrecht*, 80 U. S.; 13 Wall., 434, 447 (20:659, 663); *Hornbuckle vs. Toombs*, 85 U. S.; 18 Wall., 648, 655 (21:966, 968); *Good vs. Martin*, 95 U. S., 90, 98 (24:341, 344); *Reynolds vs. United States*, 98 U. S., 145, 154 (25:244, 246); *The City of Panama vs. Phelps*, 101 U. S., 453, 465 (25:1061, 1065). And it was adjudged in *McAllister vs. United States*, 141 U. S., 174, 181 (35:693, 695), that the district court established in Alaska, although invested with the civil and criminal jurisdiction of a district court of the United States, was a legislative court, created 'in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.' It was because the Alaska court was of the latter class that we held in *McAllister vs. United States*, 141 U. S., 174 (35:693), that the judge of the district court of that Territory could be suspended from office by the President under the authority conferred by U. S. Rev. Stat., sec. 1768.

"It necessarily results that the Circuit Court of Appeals for the Ninth Circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the district and circuit courts mentioned in the Act of March 3, 1891."

We lay special stress upon the distinction above referred to, for the reason that throughout the

opinion of the lower court it is apparent that the lower court labors under the impression that although it is a territorial court, nevertheless when it exercises a jurisdiction *similar* to the jurisdiction of a district or circuit court of the United States it then becomes *ipso facto* a district or circuit court of the United States and is, therefore, controlled by the statutes governing its practice and procedure. In other words, that the dignity and character of the court is raised from that of a territorial court immediately when the court commences to exercise jurisdiction over the same subject-matter as in the States comes within the cognizance of circuit and district courts of the United States. This was the misapprehension under which Judge McAllister labored. As a matter of reason, however, there is no more warrant in a territorial court calling itself for any purpose "A court of the United States," "A district court of the United States," or "A circuit court of the United States," when it is exercising jurisdiction over these matters than there would be for one of the English courts to call itself a district court of the United States when exercising its jurisdiction in admiralty. The identity of the subject-matter of the jurisdiction certainly can have no effect upon the character of the court under the circumstances. We submit, therefore, that a reading of the act of Congress of 1857, from which section 1024 is taken, shows conclusively that the act was intended to apply only to district

and circuit courts of the United States, and this being the case, the act is inapplicable, as held in the cases above cited, and has distinctly been held by this court in the case of

Corbus vs. Leonhardt, 114 Fed., 10.

In that case the court uses the following language:

“Hawley, district judge (after stating the facts as above): 1. The objections presented by the first assignment of error are based upon the ground that the testimony of Dr. Leonhardt comes within the provisions of section 858, Rev. St., and that by this section he was not a competent witness to any transactions and conversations between himself and defendant's intestate. We are of opinion that the court did not err in admitting the testimony objected to. It is, perhaps, true, as claimed by the plaintiff in error, that there is no decision directly in point, but the decisions bearing upon the general question lead us to the conclusion that section 858 does not apply to territorial courts. *Good vs. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341; *McAllister vs. U. S.*, 141 U. S., 174; 11 Sup. Ct., 949; 45 L. Ed., 693; *Thiede vs. Utah*, 159 U. S., 510, 515; 16 Sup. Ct., 62; 40 L. Ed., 237; *The Coquitlam vs. U. S.*, 163 U. S., 346, 351; 16 Sup. Ct., 1117; 41 L. Ed., 184; *Jackson vs. U. S.*, 42 C. C. A., 452; 102 Fed., 473, 479.

“In *Good vs. Martin*, *supra*, the court said:

“Territorial courts are not courts of the United States, within the meaning of the

constitution, as appears by all the authorities. *Clinton vs. Englebrecht*, 13 Wall., 434; 20 L. Ed., 659; *Hornbuckle vs. Toombs*, 18 Wall., 648; 21 L. Ed., 966. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to or interested in the issue tried, but the provision has no application in the courts of a territory where a different rule prevails.'

"*Page vs. Burnstine*, 102 U. S., 664; 26 L. Ed., 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the act providing a government for the District of Columbia, which are not applicable to Alaska. In the course of the opinion the court said:

" 'These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to territorial courts.'

"By provision of section 3 of the 'Act providing a civil government for Alaska,' approved May 17, 1884 (23 Stat., 24), there was 'established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States.' By section 7 of this act it was provided 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' At the time this law was enacted there were no restrictions excluding wit-

nesses from testifying in any case. 1 Hill's Ann. Laws Or., sec. 710. These laws were in force in Alaska at the time this suit was brought and at the time of Robert Duncan's death, and were applicable to the proceedings had in this case."

To the same effect see *U. S. vs. Ball*, 147 Fed., 32 (C. C. A. 9th Circuit).

No attempt is made in the opinion of the lower court to reconcile its ruling with the case of *Corbus vs. Leonhardt* or any of the other cases above cited, nor is any discussion given whatever to the ruling of this court in the case of *Corbus vs. Leonhardt*. There certainly can be no question but that the District Court of the District of Alaska is yet a territorial court, for the latest rulings hold Alaska to be a Territory. See—

Interstate Commerce Commission vs. U. S.,
Oct. term, 1911.

Lawyer's Co-Op. Adv. Sheets, p. 556.

Nagel vs. U. S., 191 Fed., 141.

(b) *Legislation subsequent to the Act of February 26, 1853 (which first introduced section 1024 into the Federal Statutes) shows that it has never applied to the Territories except where specifically extended thereto.*

No Territory of the United States is mentioned in the act except the Territory of Oregon. The act contains the following proviso:

“Provided, That in the State of California and the Territory of Oregon officers, jurors and witnesses shall be allowed for the term of two years double the fees and compensation allowed by this act, and the same fees allowed with this act with fifty per cent added thereto for two years thereafter.”

It will be seen, therefore, that the general provisions of the act were not extended to the Territory of Oregon, and only that portion of it which related to the schedule of fees had any relation to the Territory of Oregon, and by the terms of the act only related to the Territory for the period of four years after the passage of the act. It was soon discovered that the act did not extend to the Territories, and the provisions of the act, in so far as they relate to fees and compensation, were extended to three Territories by chapter 175 of the Statutes at Large (see vol. 10, p. 671). The Territories over which the operation of the act was extended were the Territories of Minnesota, New Mexico, and Utah. The extension of this act over these particular Territories is discussed by the Supreme Court of the United States in the case of

United States vs. Averill, 130 U. S., p. 335.

Subsequently, on the 7th of August, 1882, Congress extended the Act of February 26, 1853, to the Territories of New Mexico and Arizona (New Mexico having been in the meantime subdivided) in so far as the act related to fees and compensation. (See 22 Stat. at Large, p. 344.)

In 1883 the compensation of the clerk of the Supreme Court of the District of Columbia was made the same by special enactment. (22 Stat. at Large, p. 344.)

When the first organic act was passed for Alaska (the Act of May 17, 1884), the Act of February 26, 1853, was not extended to the district of Alaska, the following provision being the provision adopted:

“SEC. 9. The governor, attorney, judge, marshal, clerk, and commissioner * * * they shall severally receive the fees of office established by law for the several offices, the duties of which have hereby been conferred upon them as the same are determined and allowed in respect to similar officers under the laws of the United States, which fees shall be reported to the Attorney General and paid into the Treasury of the United States.”

It must necessarily be assumed, therefore, that section 1024 was never intended by Congress to apply except to the practice in district and circuit courts of the United States.

(c) Provisions prohibiting the joinder of more than one offense in an indictment, long prior to March 22, 1882, had been adopted by all of the Western States and Territories, when the Edmonds Act was passed, and the provisions of that act conclusively show that Congress realized that section 1024 did not apply to the Territories.

Section 43 of the present Code of Criminal Procedure for the district of Alaska was first enacted in Oregon on the 19th day of October, 1864. (See Carter's Code, p. 52, footnote to section 43.) Similar provisions were adopted as follows: Montana, prior to 1873 (see sections 184 and 188, Laws of Montana, 1871 to 1872); Arizona, prior to 1872 (see section 217, Laws of Arizona, 1864 to 1871); California, prior to 1853, Laws of California, 1850 to 1853, section 241; Nevada, prior to 1874 (see section 1862 (238) Compiled Laws of Nevada, vol. 1, 1861 to 1873); Utah, 1878, section 153, Laws of Utah, 1878; Washington (see vol. 2 of Hill's Code, page 479, section 1238); and Idaho, prior to 1875, section 237, Laws of Idaho, 1874-5. So that, prior to the passage of the Edmonds Act in 1882, and prior to the passage of the first act providing for civil government in the District of Alaska, May 17, 1884, it must be presumed that Congress knew that in none of the Western States or Territories could more than one crime be stated in an indictment.

(d) The Edmonds Act.

On March 22, 1882, the Edmonds Act was passed providing for the punishment of polygamy and kindred offenses in the Territories and other places under the jurisdiction of the United States. By section 4 of that act (see Statutes at Large, vol. 22, p. 31) we find that Congress has made special provision for the joinder of separate offenses of polygamy and kindred social crimes.

If section 1024 applied to the Territories in cases of prosecution for offenses against the statutes of the United States as distinguished from territorial acts, why, then, was it necessary for Congress to specially permit the joinder of such offenses in the Territory?

Since the enactment of the Alaska Code Congress has adopted an act known as the "Crimes Act," and under the chapter entitled "Certain Offenses in the Territories" it has provided for the joinder of certain offenses therein named, not including the offenses charged in the indictment at bar.

Under act of Congress, March 4, 1909, chapter 13, entitled "Certain Offenses in the Territories," the provisions of the Edmonds Act are substantially re-enacted.

If section 1024 was in effect in the Territories, why was it necessary for Congress to again give special permission for the joinder of particular offenses?

Second. UNDER THE ACT OF MAY 17, 1884, PROVIDING A CIVIL GOVERNMENT FOR ALASKA, THERE IS NO QUESTION BUT THAT THE OREGON LAW WAS ADOPTED, AND THAT ONLY ONE CRIME COULD BE STATED IN AN INDICTMENT.

In order to secure a correct understanding of the meaning of the Alaska legislation, it is necessary to follow chronologically the history of the legislation with reference to Alaska and with reference to its administration. The treaty with Russia was ratified on the 20th day of June, 1867. (See introduction to Carter's Alaska Code, pages XVII to XIX.) On Friday, October 18, 1867, General Rossseau raised the American flag at Sitka and the Russian flag was lowered, and the United States took formal possession of Alaska.

After the proclamation of the treaty of purchase no legislation was had concerning Alaska until the provisions relating to the unorganized Territory of Alaska Act of March 5, 1872, were passed. These provisions are to be found in the Revised Statutes, sections 1954 to 1976. The customs laws were extended to the district and authority given to the Secretary of the Treasury to lease the Seal Islands by this act, and jurisdiction was conferred on the courts of the United States for California, Oregon, and Washington. (See introduction to Carter's Alaska Code.) Practically all violations of the laws that were prosecuted at all were prosecuted before Judge Deady, Federal judge at Portland, as will be seen from an

examination of the early cases found in the Federal Reporter. On the 17th of May, 1884, the first act providing civil government for Alaska was approved. This act provided for a governor, the organization of a district court, a judge of that court, a district attorney, marshal, and clerk, four commissioners. "Such commissioners shall exercise all the duties and powers, civil and criminal, now conferred on justices of the peace under the general laws of the State of Oregon." (See sec. 5, Carter's Alaska Code, p. 440.)

Section 7 of this act provided:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." (See Carter's Code, p. 441.)

It is not surprising, under the circumstances above stated, that Congress saw fit to adopt Judge Deady's Code of 1881, together with such modifications as may have been enacted between that date and May 17, 1884, as the law of Alaska; nor is the action of Congress in adopting the laws of another State as the laws of a Territory without precedent, as this was done with reference to legislation of Indian Territory, where the laws of Arkansas were adopted. See—

Belt & Gulf Ry. Co., 22 Southwestern, 1063.
P. Ardmore Coal Co. vs. Bevelle, 61 Fed.,
 757.

Ex parte Fuller, 182 U. S., 562.

In the Territory of Oklahoma the legislation of the State of Nebraska was adopted. See—

U. S. vs. Choctaw & O. G. Ry. Co., 41 Pac., 729, at p. 746.

In deciding the question in issue in this case, the lower court, in attempting to show that the rule adopted in the case of—

Clinton vs. Englebrecht, 80 U. S., 444,

has no application to Alaska, in its opinion contends that Alaska is in a different situation from the Territories to which a legislature had been given, and uses the following language:

“It will also be observed that all the organic acts creating the Territories and empowering them to elect local legislatures to legislate for said Territories, contain substantially the same provision, that conferring legislative authority on the Territory of Utah, which is quoted in *Clinton vs. Englebrecht*, 80 U. S., on page 444, as follows:

“‘The legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act.’

“It is apparent from such legislation that Congress intended that the legislatures of the various Territories should be vested with full power to legislate, not only concerning legal procedure, both criminal and civil, but also to enact any substantive legislation not inconsistent with the Constitution

of the United States and the acts of Congress creating such Territories. The Supreme Court of the United States, in the cases of *Clinton vs. Englebrecht* and *Hornbuckle vs. Toombs, supra*, holds that the power granted to the legislatures to legislate for the Territories, and the approval of their legislation by Congress indicates that it was the intention of Congress to lodge in the local legislatures of the Territories power to legislate when not in conflict with the Constitution of the United States or the organic acts of such Territories. It must, therefore, be conceded to be the settled law that in a Territory where a legislature has been provided for by act of Congress such legislature has the power to provide for the procedure to govern the trial of all causes, without reference to whether or not the same are being conducted under the local laws of the Territory or under the general laws of the United States. The Alaska cases cited by counsel which have been passed on by our appellate court deal with questions of procedure in the prosecution of violations of the local law. It must be admitted that Alaska is an organized Territory within the meaning of section 1891 of the Revised Statutes of the United States, which provides:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States." *Nagle vs. United States*, 191 Fed., 141. But does it follow, because Congress has seen fit to grant to the legislatures of the Territories

where legislative assemblies are provided, to enact a complete set of laws governing procedure in all cases, that it did not intend to extend to Alaska any of the general laws of the United States providing for the procedure in Federal courts?"

The foregoing shows that the lower court in rendering its opinion gave no consideration whatever to the decision of the Supreme Court of the United States in the case of

United States vs. Pridgeon, 153 U. S., 48.

In discussing the adoption of the laws of Nebraska upon the organization of the Territory of Oklahoma, the court uses the following language:

"It was intended by Congress that the laws of Nebraska should constitute a territorial code as distinguished from the laws of the United States in force in the Territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

We claim that it is very apparent that Congress had no intention whatever of discriminating between the code of laws theretofore enacted by the Territory and State of Oregon and any code of laws which might have been enacted by a legislative assembly of the district of Alaska, had such assembly been created.

Third. THE LEADING CASES.

In order to understand the meaning and application of the Act of 1884, let us refer for a moment to the situation with reference to the construction that courts had placed upon the powers and duties and practice of a territorial court prior to the adoption of the laws of Oregon by the Organic Act of 1884.

On the 15th of April, 1872, the Supreme Court of the United States rendered its decision in the case of

Clinton vs. Englebrecht, 80 U. S., 434,

wherein it held that the courts of a Territory are not courts of the United States, and wherein it held that the law of a territorial legislature prescribing the mode of obtaining panels for grand and petit juries is obligatory upon the district courts of the Territory.

On May 4, 1874, after serious and due consideration, the Supreme Court of the United States in the case of

Hornbuckle vs. Toombs, 85 U. S., 648,

reversed all of its previous decisions to the contrary and definitely decided with reference to matters of procedure in a Territory that the courts of the Territories were to be guided by the law of procedure as established by its local legislation.

On October 22, 1877, the Supreme Court of the United States decided the case of

Good vs. Martin, 95 U. S., 90,

and the court there held that territorial courts were not courts of the United States and that that section of the laws of the United States which provide that a witness in civil cases cannot be excluded in courts of the United States because he or she is a party to or interested in the issue tried has no application to the courts of a Territory.

On May 5, 1879, the Supreme Court of the United States decided the case of

Reynolds vs. United States, 98 U. S., 145,

(criminal case), which case was decided after an original argument and two rehearings, and the court there held that the territorial practice and not the Federal practice controls in prosecutions for bigamy under section 5352 of the Revised Statutes and follows the decisions above cited. It is no wonder, therefore, that when the Edmonds Act was passed in 1882 it was deemed necessary to specially authorize the joinder of offenses of this character in one indictment, for these decisions conclusively established a doctrine which would prevent the application of section 1024 to the Territories. This matter has been discussed in a previous portion of the brief.

On April 4, 1881, the Supreme Court decided the case of

Miles vs. United States, 103 U. S., 304,

where it was held that upon a prosecution for bigamy a territorial court must follow the territorial practice in impaneling its jury.

There can be no question, then, but that Congress, in adopting the laws of Oregon as the laws of the Territory of Alaska, gave to those laws the same force and effect as if they had been specifically adopted for the Territory of Alaska by a territorial legislature with the sanction and consent of Congress. There can be no doubt that there was in the minds of Congress no distinction between the force and effect of the local laws so adopted for the Territory of Alaska and the local laws of any other Territory, nor can there be any doubt that into the construction and interpretation of those laws it was intended and fully known would be read the doctrine announced in the leading cases just above cited.

Subsequent to the passage of the Act of 1884 the doctrine of *Hornbuckle vs. Toombs* and the other cases above cited has not been departed from. On November 11, 1885, the case of *Thiede vs. Utah*, 159 U. S., 510, was decided, and it was there held that the provisions of section 1033, United States Revised Statutes, requiring that defendant have a list of the Government witnesses to be sworn before trial, applied only to United States courts and

did not control the courts of Utah Territory. It is to be noted that the section of the Revised Statutes above referred to is not limited by its terms to courts of the United States.

Subsequently in the case of

Welty vs. United States, 76 Pacific, 121,

a full and complete discussion of all of the authorities was had by the Supreme Court of the Territory of Oklahoma and the doctrine reaffirmed that local procedure governs in prosecutions in the territorial courts.

To the same effect is a decision of the Federal district court in the case of

United States vs. Haskell, 169 Fed., 449.

On the 30th of July, 1906, a complete and exhaustive opinion upon the same subject was rendered by the Circuit Court of Appeals for the Eighth Circuit, speaking through Van Devanter, circuit judge (now Mr. Justice Van Devanter), in the case of

Cochran vs. U. S., 147 Fed., 206.

The disposition throughout the entire opinion of the lower court in the case at bar to hold that there is a distinction between the practice where the territorial court is sitting in judgment upon a local crime and sitting in judgment upon an offense against the laws of the United States is effectively disposed of by Judge Van Devanter. The court uses the following language:

"It is important, therefore, to inquire whether the territorial district court, when exercising the jurisdiction of the circuit and district courts of the United States in the trial of an offense against the laws of the United States, should conform to the practice and modes of proceeding in the circuit and district courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated decisions of the Supreme Court of the United States, *Reynolds vs. United States*, 98 U. S., 145; 25 L. Ed., 244; *Miles vs. United States*, 103 U. S., 304, 310; 26 L. Ed., 481; *Clinton vs. Englebrecht*, 13 Wall., 434, 447; 20 L. Ed., 659; *Hornbuckle vs. Toombs*, 18 Wall., 648; 21 L. Ed., 966; *Good vs. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341. These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, are not courts of the territories; that the practice and modes of proceeding, including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specifically provided by some law of the United States."

Fourth. SUBSEQUENT DECISIONS OF THE VARIOUS COURTS ARE UNIFORM TO THE EFFECT THAT THE CRIMINAL PROCEDURE ESTABLISHED BY THE LAWS OF OREGON CONTROL IN THE DISTRICT OF ALASKA.

In May, 1891, the case of *United States vs. Clark*, 46 Federal, p. 633, was decided by Judge Bugby, one of the early judges of the district court. It was there held that the crime of murder under section 5339 of the Revised Statutes punishing the crime within the maritime and territorial jurisdiction of the United States wherever the same is committed in any fort, arsenal, dockyard, magazine or any other place, district, or country under the exclusive jurisdiction of the United States, should be punished under that section and not under the section of the Oregon law punishing the crime of murder, for the reason that the section of the Revised Statutes above cited had special application to the Territory. The court then proceeds:

“This court, under the authority of the organic act, must follow the course of *procedure in all cases*, civil and *criminal*, laid down in the general laws of Oregon in force May 17, 1884, so far as the same may be applicable and not in conflict with the provisions of the organic act or the laws of the United States which have been extended to the Territory.”

On the 14th of May, 1900, the Circuit Court of Appeals (this court) decided the case of—

Jackson vs. United States, 102 Federal, p. 473,

and held that the Oregon statutes with reference to criminal practice were to be regarded as the rule of procedure in the District of Alaska.

On the 3d of February, 1902, this court decided the case of—

Corbus vs. Leonhardt, 114 Fed., 10,

previously quoted in this brief, which must be considered decisive of the general proposition involved in this case.

On the 28th of May, 1900, the question involved in this case, we take it, was settled for all time by the Supreme Court of the United States in the case of—

Fitzpatrick vs. United States, 178 U. S., 304.

This was a prosecution for murder under section 5339 of the Revised Statutes. Mr. Justice Brown, in deciding the case, used the following language:

“By section 7 of an act providing a civil government for Alaska, approved May 17, 1884, it is enacted ‘that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable, and not in conflict with the provisions of this act or

the laws of the United States.' We are therefore to look to the laws of Oregon and the interpretation put thereon by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder, rather than to the rules of the common law."

The court then proceeds to test the indictment by section 1268, Hill's Annotated Laws of Oregon, and by section 1270. These same sections are now a part of the Alaska Code of Criminal Procedure, being sections 38 and 40 of chapter 7, part II (see Carter's Code, pp. 51 and 52).

They are a part of the same act and chapter which originally became the law of Oregon in 1864 and which act and chapter then and now contain the provision prohibiting the statement of more than one crime in the indictment.

Fifth. SINCE THE ADOPTION OF THE NEW ALASKA CODE, 1899-1900, THIS COURT HAS FOLLOWED THE RULE HERETOFORE LAID DOWN IN CONSTRUING THE ACT OF MAY 17, 1884.

In the case of—

United States vs. Ball, 147 Fed., 32,

at page 36 (June, 1906), this court, speaking through Judge Gilbert, used the following language:

"It is assigned as error that the court overruled the motion of the plaintiff in error to require the district attorney to furnish

him a list of all the witnesses to be produced against him on the trial in accordance with the provisions of section 1033 of the Revised Statutes. (U. S. Comp. St. 1901, p. 722.) That statute applies only to the trial of treason and capital cases in the courts of the United States. The present case was tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise. In *Thiede vs. Utah Territory*, 159 U. S., 510-515; 16 Sup. Ct., 62; 40 L. Ed., 237, it was held that section 1033 does not control practice and procedure in territorial courts. The court said:

“In the absence of some statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial.”

Sixth. THE PROPER INTERPRETATION OF THE ALASKA CODE.

The inrush of gold seekers to Dawson in 1897 and to Nome in 1898 and 1899 caused the population of Alaska to greatly increase, and new legislation became necessary. This legislation was referred to committees and placed in the charge of Hon. Thomas H. Carter, Senator from Montana. By the month of March, 1899, the first two parts of this code were completed and enacted (see Act of March 3, 1899, p. 429, entitled “An act to define and punish crimes in the District of Alaska and

to provide a code of criminal procedure for said district"). Carter's Code, page 1, *et seq.*, parts III, IV, and V of the Alaska Code were perfected and became law under the Act of June 6, 1900, entitled "An act making *further* provision for a civil government for Alaska, and for other purposes," but as we shall see later, these acts are considered as two installments of one general scheme of codification.

The provisions of these acts which are material to the questions passed on by the lower court in this case are as follows:

1. The title to the Act of March 3, 1899 (just recited),

2. The enacting clause, which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:"

In examining these two provisions there is no difficulty in ascertaining that in passing the act it was the intention that the criminal procedure laid down in the act should be followed in all prosecutions for crime in the District of Alaska.

The only difficulty arising in the construction of the act is due to the crude and unworkmanlike

introduction to part II of the act, section 1 of which is in the following words:

"SEC. 1. Crimes and offenses, how prosecuted.—That proceedings for the punishment and prevention of the crimes *defined in title I of this act* shall be conducted in the manner herein provided."

(a) If it were not for this one section no claim could be made that the act was obscure in any part in so far as it relates to the question in issue in this case. It is to be noted, however, that no provision is made for any other and different method of procedure in relation to crimes *not defined in title I*. Of course the crime charged in this case is an offense against the Revised Statutes of the United States and is not defined in title I. If, however, part II does not provide the rule of procedure in crimes not defined in title I, what procedure does apply? It must still be the law as adopted by the Act of May 17, 1884, and as construed by the decision of the Supreme Court of the United States in *Fitzpatrick vs. United States* and other cases, *supra*, because section 1 does not repeal the theretofore legally authorized practice applicable to prosecutions for violations against offenses, which practice was fully defined in the case of *Fitzpatrick vs. United States*. Therefore in effect there would be no difference, so far as the rights of this defendant are concerned, because section 43 of this Criminal Code of Procedure was a part of the Oregon law applicable to the District of Alaska prior to the adoption of this code.

Chapter 2 of the Code of Criminal Procedure adopts the Federal Statutes of Limitation for the prosecution of crime and is in the following language:

“SEC. 6. That criminal action must be commenced within the periods prescribed in the laws of the United States now in force or that may hereafter be enacted.”

Upon the publication of this Code Senator Carter set out in his footnotes the exact portion of the Revised Statutes of the United States thereby read into the Code. (See Carter's Code, p. 45.)

A second compilation of the laws of Alaska was promulgated under the supervision of the Secretary of War by the Bureau of Insular Affairs on the 10th of January, 1906, this codification being prepared under the direction of Paul Charlton, law officer of the Bureau of Insular Affairs, by Fred F. Barker, and is known as Senate Document No. 142 of the Fifty-ninth Congress, first session. In the marginal annotation given in this compilation the precise sections of the Revised Statutes to be read into the Code by reason of section 6 are cited (being sections 1043 and 1044) (see section 6 and the annotations of Senator Carter and Mr. Charlton). Section 6 has some bearing upon the case at bar, but is here referred to mainly to show the method adopted by Senator Carter and Mr. Charlton in giving to the public at the time the revisions were made citations to those portions of the Re-

vised Statutes which should be read into the act. If it was intended by Act of 1899 to establish a dual system of procedure, why did not Congress provide so that crimes in title I should be limited by Oregon statutes and other crimes by the laws of the United States?

Chapter 4 of the Alaska Code, section 10, provides as follows:

"SEC. 10. Grand jury, how selected and summoned. That grand juries, to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well as those that are designated in title one of this act as those that are defined in other laws of the United States." (See Carter's Code, p. 46.)

It is upon the interpretation and construction of this section that the lower court held that the entire law, as previously understood in Alaska, was changed, and that the general rule that local procedure should control the territorial courts was abolished and Alaska made an exception to the general rule that in the prosecution of Federal offenses the Federal procedure should be followed.

It is said by the court below, in effect, that owing to the peculiar wording of section 1, part II, of the Alaska Criminal Code, the rest of the act must necessarily be construed so as to reconcile the rest of the act with section 1. An examination of the opinion of the lower court will show that there is no actual or even apparent conflict in the reading of any of the sections except when section 1 of part II is brought into consideration. The court holds specifically that in view of section 1, section 10 must not be given its ordinary and apparent meaning, but in order to reconcile it with section 2 the court uses the following language:

“While its language is confusing and contradicts section 1, as well as other provisions of the Code of Criminal Procedure, when carefully considered in the light of the dual powers of the court as well as the other sections of the Code of Criminal Procedure, it is reasonably clear that Congress intended by section 10 to provide for two methods of procedure: one to govern the trial of offenses against the general laws of the United States and the other to govern the proceedings in the prosecution of local or territorial crimes defined in title I of the act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure in said district. Section 10, therefore, should receive the construction which would be warranted if it contained the following language:

“That the grand juries, to inquire of the crimes designated in title I of this act, committed or triable within said district, shall

be selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; and grand juries, to inquire of crimes defined in other laws of the United States, committed or triable within said district, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well as those that are designated in title I of this act as those that are defined in other laws of the United States.' "

It will be seen by a comparison with section 10 as it is actually enacted and the reading above given to it by the lower court, the section by this reading is doubled in verbiage; the one sentence contained in section 10 is split into two distinct propositions and the words "proceedings of the grand jury" are made to modify only that portion of section 10 which referred to crimes defined in other laws of the United States (and not in title I). We respectfully submit that the construction is so remote that upon a reading of section 10, together with other sections involved in this question, the conclusion must be reached that the construction is one that would tax the ingenuity of any reasonable mind and does not carry with it any

satisfactory conviction which would appeal either to the common sense of the bench and bar or to these rules in English construction by the aid of which the real intent and meaning of a legislature is arrived at.

The construction so adopted by the lower court is untenable and subject to the following criticisms:

a. Section 1, part II of the Act of 1899, if given its widest reasonable scope leaves the pre-existing Oregon law in effect as to crimes not defined in part I (this proposition has been previously discussed and disposed of at pages 34-5 of this brief).

b. Giving to the phrase "proceedings of grand jury" (for the sake of argument) the reading attributed to it by the lower court, and above set forth, nevertheless such reading does not justify the court's conclusion that a dual system of criminal procedure was thereby adopted.

c. Neither the Act of March 3, 1899, nor section 10 of said act changes the pre-existing law or creates a dual system of procedure, but on the contrary the act adopts one system of procedure and consolidates the Oregon practice with certain features of the Federal Statutes which were applied to the Act of 1884 by previous judicial decision where the laws of Oregon were discovered to have been inapplicable.

d. The opinion of the lower court ignores the scope of the enacting clause of the act.

e. Ignores the plain meaning of the words in section 10.

f. Violates the thoroughly well-established general rule laid down with reference to the effect of territorial legislation upon the procedure of its courts.

g. Carries with it an implied intent to repeal the pre-existing law without respect to the stern and sound presumption of law against change in the law and implied repeal.

h. Violates the intent of the legislation so easily gathered from contemporary annotations set forth in the compilations of the Alaska Code.

It is apparent that section 1024 has been by the lower court read into the Alaska *procedure* by applying the words "*proceedings* of the grand jury" as a modifying phrase only to that portion of section 10 which refers to prosecutions for crimes defined in "other laws of the United States."

Conceding that section 10 is entitled to the remote and ingenious construction attributed to it by the lower court in its statement of how the section should be read, the court has failed to justify the interpolation of section 1024 into any *procedure*

in the District of Alaska, because the words "*proceedings of the grand jury*" have not the scope to include the field of *criminal procedure* covering the joinder of offenses or the consolidation of causes. The matter involved in this case is a question of general procedure and not of proceedings of the grand jury. In construing this particular expression the following must be borne in mind, that as a practical matter the grand jury has never had anything to do with questions of joinder or with questions as to the form of the indictment. From the earliest time such matters have come under the practical jurisdiction, first, of the prosecuting attorney, and, second, after the defendant appeared, of the court. From the earliest times the indictment has always been drawn by the prosecuting attorney and he determines those questions of law which refer to the form and the method of drawing the indictment; the indictment having been formulated is then presented to the grand jury and voted upon by the grand jury either as "a true bill" or "not a true bill" and is there endorsed accordingly.

We have been unable to find any definition in the book construing the meaning of the phrase "proceedings of the grand jury," but it is a well-known phrase and used frequently by digesters and encyclopedists and the scope of the phrase is easily ascertainable by an examination of such works.

The Cyclopedia of Law and Procedure, vol. 20, article on grand juries by Horace E. Deemer,

Chief Justice of the Supreme Court of Iowa, page 1293, gives a classification of those matters which come within the scope of the above phrase, which is as follows:

“Proceedings before Grand Jury.

- A. Presence of Accused.
- B. Presence of Attorney for Prosecution.
 - 1. In General.
 - 2. Assistant Attorney or Special Counsel.
 - 3. Private Prosecutor.
- C. Presence of Presiding Judge.
- D. Presence of Officers.
- E. Presence of Stenographers.
- F. Presence or Interference of Stranger.
- G. Witnesses.
 - 1. Summoning Witnesses.
 - 2. Volunteer Witnesses.
 - 3. Swearing Witnesses.
 - a. In General.
 - b. Form of Oath.
 - 4. Examination and Control of Witnesses.
 - a. In General.
 - b. Recognizance of Witness.
 - c. Mode of Examination.
- H. Evidence before Grand Jury.
 - 1. Admissibility of Evidence.
 - a. In General.
 - b. Testimony of Accused.
 - 2. Sufficiency of Evidence.
 - 3. Minutes of Evidence.
 - 4. Inspection of Premises.
- I. Number of Grand Jurors Concurring in Finding.
- J. Misconduct of Grand Jurors.

K. Secrecy.

1. In General.
2. Disclosure in Judicial Proceedings.
 - a. In General.
 - b. In Civil Proceedings.
 - c. Disclosure by Prosecuting Attorney, Witness, etc.
3. Disclosure as Criminal Offense.

L. Advice of Court.

M. Executive Control Over Grand Juries.

N. Record of Finding and Proceedings.

O. Presumption of Regularity."

The same scope is given to the meaning of this phrase in the Encyclopedia of Pleading and Practice, vol. 10, pages 344-5, in the subject classification at the beginning of the article on indictments.

The Century Digest, vol. 24, columns 2752 and 2753, under the subhead "Conduct of Proceedings," gives the same scope and no wider to the meaning of the phrase.

How can it be said, therefore, that section 1024, referring to consolidation and joinder of crimes in the drafting of an indictment for which the district attorney is responsible, comes within the scope of the words "proceedings of the grand jury"? The difficulty with the opinion of the lower court is that he has confounded the word "procedure" (or criminal procedure or court procedure) with the words "proceedings of grand jury." It is quite evident that the proceedings of the grand jury referred to in section 10 of the act relate only

to those rules which govern the organization and conduct of the grand jury as a deliberative organization while they are in the course of their deliberations.

(c) Neither the Act of March 3, 1899, nor section 10 of said act, changes the pre-existing law or creates a dual system of procedure, but on the contrary the act adopts one system of procedure and consolidates the Oregon practice with certain features of the Federal statutes which were applied to the Act of 1884 by previous judicial decision where the laws of Oregon were discovered to have been inapplicable.

An examination of the constitution of Oregon, in effect since prior to May 17, 1884, develops the true reason why the laws of Oregon were not copied into the criminal code instead of section 10. Constitution of Oregon, article 7, section 18, ratified November 18, 1857, and approved by Congress February 14, 1859, reads as follows:

“SEC. 18. Jurors.—The legislative assembly shall so provide that the most competent of the permanent citizens of the *county* shall be chosen for jurors; and out of the whole number in attendance at court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But the legislative assembly may modify or abolish grand juries.” (Italics ours.)

In Alaska there is not now and never has been any *county* organization, and therefore the law of Oregon was inapplicable to the local conditions, and it became necessary to adopt some different method from that provided by the laws of Oregon for drawing grand juries, providing for the number that should make up a panel and providing for the number necessary to concur in order to find a valid indictment. Therefore it is not necessary to enter into the field of remote speculation and adopt the theory that by the enactment of section 10 Congress intended to adopt a system of dual procedure in this Territory where it existed in no other Territory in order to explain the presence of section 10 in the Alaska Code. The old Oregon Act of 1864, pursuant to the provision of the constitution above cited, provided:

"An indictment cannot be found without the concurrence of at least five grand jurors and when so found must be endorsed 'a true bill,' and such endorsement signed by the foreman of the jury."

Section 29, part II of the Alaska Criminal Code, provides:

"That an indictment cannot be found without the concurrence of at least twelve grand jurors, and when so found it must be endorsed 'a true bill' and such endorsement signed by the foreman of the grand jury."

Senator Carter, in his Annotated Alaska Code, page 49, footnotes, refers to section 1021 of the Revised Statutes of the United States and section 1259 of Hill's Annotated Laws as the combined source from which section 29 of the new Code of Criminal Procedure was derived, so that it is apparent that Congress intended by section 10 and by section 29 to adopt the laws of the United States with reference to the drawing of the grand jury and to the number that should constitute a grand jury and the number who might find an indictment, and no distinction with reference to a dual system of procedure can be inferred from these two sections.

The difficulty in drawing a jury under the provisions of the Oregon Code in effect May 17, 1884, is clearly noted by Judge Deady in his opinion

(1886) *Kie vs. United States*, 27 Fed., 351.

At page 358, referring to the Oregon Code, he uses the following language:

"The following sections of the Code, providing for the selection of jurors and the formation of a jury-list by the county court from the assessment roll are, of course, inapplicable, as there are neither county courts nor assessment rolls in Alaska."

In the case above cited Judge Deady held that the crime of murder as defined in section 5339, R. S. U. S., where the same is committed in any dis-

trict or country under exclusive jurisdiction of the United States applied to Alaska and not the Oregon statute. He further held that the grand jury should be summoned and drawn in accordance with the provisions of the Revised Statutes of the United States, and then proceeds to use the following language:

"But the question as to whom is *qualified* to serve as a juror in the district court of Alaska must be answered by the law of Oregon."

Doubtless it will be claimed by the United States Attorney that some of the general expressions in the case of *Kie vs. United States* sustain the theory that where any law of practice in the State of Oregon conflicted with a law of practice used in the Federal procedure, the Federal procedure would control. It is true that some of the general expressions in Judge Deady's opinion are subject to such an interpretation, but the opinion does not discuss that question directly. The group of leading cases, in which *Hornbuckle vs. Toombs* is one of the most prominent, is not mentioned in his opinion, and the repeated expressions of this court and the Supreme Court of the United States are in conflict with the language in the *Kie* case, upon which the United States may depend. The fact is that, owing to the county system in Oregon, the method of drawing a jury under those laws was "locally inapplicable," and it became absolutely necessary for Judge Deady to establish for Alaska

a practice by which juries, both grand and petit, might be drawn, and this practice he did establish. The case is cited for the purpose of showing that the law laid down years after in section 10 of the Alaska Code of Criminal Procedure did not differ in any way from the method prescribed in the decision of *Kie vs. United States*.

Section 10 simply provided a set of rules governing the drawing, summoning, and organization of grand juries in the District of Alaska. An examination of chapter 5, which is made up of sections 10, 11, and 12, necessarily confirms the conclusion that a dual system of procedure was not intended.

Section 10 provides a method of summoning, drawing and organizing the grand jury in all cases, and could not be copied from the Oregon law by reason of the county system in Oregon and therefore had the appearance of new legislation.

Section 11 defines the qualifications of grand jurors and is an exact copy of the Oregon law.

Section 12 names the persons who are exempt from jury duty and is an exact copy of the Oregon law.

It must be apparent that Congress, instead of intending to establish a system of dual procedure, intended by the act to merge both systems into one.

It is evident that there is no impediment to the sensible construction to the Code of Criminal Procedure to the effect that the code provided a uniform system of procedure for the disposition of all criminal cases, whether of local or general nature, except the language of section 1, part II of the act, which read alone would apparently limit its application to those particular crimes defined in part I.

We consider section 13 of the act as determinative of the proposition that all prosecutions were to be conducted in accordance with the methods of procedure laid down in the act. Section 13 of the act reads as follows:

“Duty of the Grand Jury. The grand jury shall have power and it is their duty to inquire into *all* crimes committed or triable within the jurisdiction of the court and present them to the court either by presentment or indictment, *as provided in this act.*”

This is an exact reproduction of the laws of Oregon (see Hill's Ann. Laws, p. 1242), with the exception that the words “jurisdiction of the court” are substituted for the word “county” as contained in the Oregon laws.

Section 36 of the Code of Criminal Procedure, we believe, also is determinative of the question in issue in this case. It provides as follows:

“That the forms of pleading and rules by which the sufficiency of pleadings is to be determined are those prescribed by this act.”

Having already indicated by sections 10 and 13 that the scope of the act extended to all offenses, whether defined in title 1 or by other laws of the United States, can it be sensibly or reasonably assumed that section 36 would have been enacted in the language above quoted if there had been an intention on the part of Congress to create a *dual* system of criminal procedure in the district? We cannot see how upon due consideration any answer can be given to the question except that it was intended that section 36 of chapter 7 and all the rest of the provisions of chapter 7 should be applied to any and all indictments returned in the district.

Section 36 is the first section of chapter 7, part II of the Alaska Code, page 51. Section 37 reads as follows:

“That the first pleading on the part of the United States is the indictment.”

Section 38 is as follows:

“That the indictment must contain—

“First. The title of the action, specifying the name of the court to which the indictment is presented and the names of the parties.

“Second. A statement of the facts consti-

tuting *the offense* in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Italics ours.)

It is to be noted that the plural of the word "offense" is not used in this case.

This is one of the sections used by Mr. Justice Brown in the Fitzpatrick case, above cited, in testing the sufficiency of the indictment under the Oregon law. Section 39 sets forth a skeleton form of indictment. Section 40 provides:

"The manner of stating the act constituting the crime as set forth in the appendix of this act is sufficient in all cases where the forms are given, where the forms there given are applicable, and in other cases may be used as nearly similar as the nature of the case will permit."

(This also is one of the sections referred to and used in testing the sufficiency of the indictment under the Oregon law in the Fitzpatrick case, *supra*.)

Section 41 provides:

"That the indictment must be direct and certain as it regards:

"First. The party charged;

"Second. The crime charged, and

"Third. The particular circumstances of the crime charged when they are necessary to constitute a complete crime."

Section 42 provides for the indictment of the defendant by a fictitious name and the substitution of his true name upon discovery.

Section 43 is the section upon which the plaintiff in error relies and has been quoted before. It prohibits the statement of more than one crime in the indictment.

Section 90 provides the grounds of demurrer in a criminal case, among others:

“Second. That it (the indictment) does not substantially conform to the requirements of chapter 7, title II of this act.

“Third. That more than one crime is charged in the indictment.”

Section 97 provides as follows:

“That if the demurrer be disallowed the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him.”

The foregoing quotations from the Alaska Code, all of which, except sections 1, 10 and part of 29, are copies of the old Oregon law, constitute, we believe, all of the sections having any material or vital bearing upon the case in issue.

(d) The decision of the court ignores the scope of the enacting clause of the act.

Parts I and II of the Alaska Code constitute but one act of Congress, the Act of March 3, 1899. The introductory language of this act is as follows:

“That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:”

Then follows part I.

The lower court in considering the Act of March 3, 1899, has completely ignored this introductory language, and we submit that the general scope of the entire act, both with reference to substance and procedure, can better be determined from this introductory clause than from the introductory clause to part II. There is no question but what the introductory clause to the entire act shows that the act was intended to give a general code of procedure for all penal laws of the United States in the District of Alaska. The introductory language of part II has before been quoted. It is as follows:

“That proceedings for the punishment and prevention of the crimes defined in title I of this act shall be conducted in the manner herein provided.”

While both of these introductory clauses above quoted occur after the words “be it enacted,” and might be technically called a part of the enacting

clause, they are nevertheless in the nature of preambles, and it is our contention that the words at the beginning of the enacting clause to the act should define its general scope rather than the introductory words to part II. As before said, both sections are more or less clumsy and crude. We submit that with reference to the substance of the act they should be treated as in the nature of preambles.

It is clear from section 10 and the other sections of the act previously quoted in this brief that Congress intended to make the crimes defined in title I of the act offenses within the District of Alaska, and further intended to make other crimes defined by statutes of the United States punishable within the District of Alaska, so that the general scope of the act is to be determined really from its body and substance rather than from these introductory clauses and the introductory clauses must be treated as preambles. If we are correct in this assumption, any conflict that may exist between the introductory language to part II and any other part of the whole act may be easily disposed of.

Mr. Black, in his book on Interpretation of Laws, section 77, at page 178, lays down the rule which should be applied to both of these introductory clauses:

“But while the uses of the preamble in cases of doubt or ambiguity are admitted, it is equally well settled that if the enacting

clause is clear, sensible and explicit it cannot be controlled in its operation or extended or abridged by any considerations drawn from the preamble; for in such cases there is no room for construction and no need to resort to the preamble. An act which is clear and specific in its enacting part will not be rendered inoperative or void by a defective or repugnant preamble."

These two sections in the Act of March 3, 1899, are the only sections which did not involve the close, discriminating work necessary to codification of those laws of Oregon applicable to Alaska. All of the other sections incorporate some pre-existing law into the act and are, by their nature, worked into the act with care and deliberation. The two introductory clauses above mentioned were probably drawn after the codification was completed, with a kind of a flourish and without deliberation, merely as introductions. We submit that they are to be treated simply as heralds of the act, and cannot under any circumstances control the intent and meaning which is to be gathered from the substantial portions of the act.

(c) The plain meaning of the words in section 10 is ignored.

We submit that no reasonable person reading section 10 can gather from it any other reasonable intent than that the section was intended to indicate that the laws defined in title I and other laws

of the United States defining crimes applicable to the district were to be enforced under the provisions of the act, and that one grand jury only should have full jurisdiction to indict either for violations of title I or for violations of other acts of Congress, and that such grand jury should be selected and summoned and their proceedings conducted in the manner prescribed by the laws of the United States (proceedings in that instance meaning the rules which governed the organization and conduct of a body while it was in deliberative session). We can imagine of no more remote or unnatural construction than to read into this act a dual system of procedure, one for the crimes in title I, and one for the crimes defined by other acts of Congress.

(f) The opinion of the lower court makes Alaska an exception to the general rule.

If the decision of the lower court is to be sustained, this court is then forced to reach, from the language of the Act of March 3, 1899, the definite conclusion that Congress intended to make Alaska different from any other Territory in the United States and exclude it from the operation of the general rule laid down in the case of *Hornbuckle vs. Toombs*, *Reynolds vs. United States*, and other cases cited, *supra*, including the decision directly applicable to Alaska in the case of *Fitzpatrick vs. United States*.

What conditions existed in Alaska to justify making Alaska the exception to a general rule adopted by the Supreme Court of the United States in a number of leading cases after very serious deliberation? What specific portion of the act can be pointed out to justify such an extraordinary intention upon the part of Congress with reference to this particular Territory?

(g) The opinion of the lower court completely ignores the basic rules of presumption against change in the law and against implied repeal.

The case of *Fitzpatrick vs. United States* settles beyond all question the doctrine that the procedure laid down in the laws of Oregon now incorporated in chapter 7 of part II, Act of March 3, 1899, must be observed in testing the sufficiency of an indictment under the Act of May 17, 1884. Therefore if the lower court is correct in its conclusion there was an express intention on the part of Congress to change the law as laid down in the case of *United States vs. Fitzpatrick* and to impliedly repeal the Act of May 17, 1884, as construed in the *Fitzpatrick* case.

What is there in the act from which such an improbable intent can be gathered? Mr. Black, in his work on Interpretation of Laws, section 52, pages 110 and 112, lays down the two basic rules:

“Presumption against unnecessary change of laws. It is presumed that the legislature

does not intend to make unnecessary changes in the pre-existing body of the law. The construction of a statute will therefore be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question."

At page 112, as follows:

"Presumption against implied repealed laws. Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation upon that subject."

The introductory section to part II of the Alaska Criminal Code, upon which is based the one justification which the lower court really gives for changing the construction of the law from that given in the case of *United States vs. Fitzpatrick*. As said before, if this section is to be given full effect against the reasonable intent and meaning of the act, it simply means that the crimes defined in title I shall be punished in the manner prescribed in title II. No method by this section is provided for procedure in relation to crimes not defined in title I of the act, nor does the section read so that the procedure in relation to crimes not defined in title I shall be changed from the rule

laid down in *United States vs. Fitzpatrick* to any other method of procedure.

The Court of Appeals of the District of Columbia in the case of *Arthur Jackson vs. United States*, recently decided (March 4, 1912), has disposed of a very similar question to the case at bar, and the language used by that court is extremely appropriate to the case at bar. The question involved in that case is the question as to whether the Crimes Act of March 4, 1909, providing that jury may qualify its verdict in a murder case by adding thereto the words "without capital punishment" applies to the District of Columbia, that is to say, whether the general legislation of the United States applies to the District or the particular legislation theretofore adopted with relation to the District. This case is to be found reported in volume 40 of the Washington Law Reporter Advance Sheet No. 12, at pages 178 and 182, and in passing upon the question the court uses the following language:

"The Federal Code embraces general legislation of general operation; the District Code local legislation of local operation. *An intent to affect or repeal the latter by the enactment of the former ought clearly to appear and will not be implied.* *Sullivan vs. Goldman*, present term. Congress has also given *Alaska* a comprehensive Code of criminal law and procedure especially suited to conditions there existing. This tends further to support our conclusion that

the general provisions of the Federal Code were not intended to affect our local Code.

"The judgment must be affirmed."

Following the general reasoning in that case we must be forced to the conclusion that the provisions of section 43, Alaska Code of Criminal Procedure, must apply, and the provisions of section 1024 of the Revised Statutes do not apply.

It is quite evident that Congress by the enactment of parts I, II, III, IV and V of the Alaska Code did not intend to repeal the law of 1884 upon any matters not fully covered by the new law, and if the lower court were even correct in the assumption that the new Criminal Code of Procedure of March 3, 1899, had to do only with crimes defined in title I, then the old law would still be in effect that an indictment could not join more than one crime. We are forced to this conclusion by an examination of the title to the Act of May 17, 1884, which is entitled "An act providing a civil government for Alaska," and from the *title* of the Act of June 6, 1900, which is as follows: "An act making *further* provision for a civil government for Alaska, and for other purposes."

We are further impelled to this conclusion by the statement of Senator Carter, the author of the Alaska Code (see Introduction to Carter's Code, pp. XVIII and XIX), wherein the author of

the Alaska Codes of 1889 and 1900 uses the following language:

"The codes make up the body of the work, but as certain acts of Congress antedating the last code may be only repealed in part."

In this connection Senator Carter has printed the Act of May 17, 1884, as a part of the still existing law.

(b) In its decision the lower court has entirely ignored the authoritative construction given to the act by its author, Senator Carter, and by the author of the subsequent codification of the War Department, Mr. Paul Charlton. The Codes of 1899 and 1900 were simply re-enactments of the old Oregon law.

If the opinion of the lower court is to be understood at all it must be accepted upon the theory that the lower court has held that section 1024 applies to indictments "under other laws of the United States not mentioned in title I" and that the words "proceedings of the grand jury" in section 10, part II, referred to the crimes not defined in title I, but in "other laws of the United States," and that thereby is read into the statutes of Alaska all of the general provisions with reference to Federal criminal procedure contained in the Revised Statutes of the United States, including section 1024, providing for joinder of separate offenses in

one indictment. Granting every other hypothesis of the lower court to be correct except the conclusion above stated, the decision must fall and suffer reversal because of the untenability of the same.

In discussing this question we first desire to call this court's attention to its own construction of the Alaska Code, to the effect that it was simply a compilation of the previous law. It is apparent that the new codification was hastily passed and that some of the expressions contained in the Code cannot be strictly applied without defeating the general intent of the legislature and the ends of justice. No better illustration of the foregoing statement can be found than the decision of this court in the case of—

Tyce Consolidated Mining Co. vs. Jennings.
137 Fed., 863.

In that case the Oregon law in effect on the 17th day of May, 1884, contained a proviso extending the period of the Statutes of Limitations for the period of one year so as to save litigants from surprise upon the enactment of the new statute. The clerk in charge of this codification, under Senator Carter's supervision, when the Oregon law was re-enacted in the Alaska Code, had this proviso re-printed, and the contention in the case was that the period of limitation in all cases was again extended in the District of Alaska for one year. This

court adopted the sensible and reasonable view in the disposition of the case that the proviso should be disregarded and that the Alaska Code should be treated simply as a re-enactment of the old Oregon law. The court, speaking through Judge Morrow, uses the following language:

"The Act of Congress approved May 17, 1884 (chapter 53, 23 Stat., 24), had made the general laws of the State of Oregon the law in the District of Alaska, so far as the same might be applicable and not in conflict with the provisions of the act of Congress or the laws of the United States. The Alaska Code of Civil Procedure contained in the Act of June 6, 1900, re-enacted the Oregon Code of Civil Procedure, with some changes to conform to the new system of government established by the act. Sections 3 and 4 of title 2 of the Alaska Code are almost exact copies of sections 3 and 4 of the Oregon Code of Civil Procedure. In section 4 of both codes there is this proviso:

" 'In all cases where a cause of action has already accrued, and the period provided in this section within which an action may be brought has expired, or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act.'

"When this proviso was first introduced into the law of Alaska by the Act of May 17, 1884, as part of section 4 of the Oregon Code, it served the purpose of preventing the in-

justice of suddenly introducing a statute of limitations into a new country. The proviso is a usual one in connection with statutes of limitations, and is intended to preserve whatever existing rights there may be at the time of their enactment for a short period, to enable parties to submit whatever claim of right they may have to the court for determination. This proviso served this purpose in the Oregon Code, and also at the time this code was originally adopted for Alaska. But there was no necessity for it in the re-enacted Code of Civil Procedure contained in the Act of June 6, 1900. It had served its purpose once, and there was no need for it a second time. The Act of June 6, 1900, did nothing more than re-enact and print in the statutes of the United States the Code of Civil Procedure of Alaska which had been in force in that Territory since May 17, 1884, and was plainly intended to add nothing to what had previously existed under that statute. The period of limitation for the commencement of this action expired under this statute on December 26, 1900, and, as this action was not commenced until June 3, 1901, it was properly dismissed."

This general rule of construction is certainly as applicable to one part of the Alaska Code as the other and should have the same weight in construing the Act of March 3, 1899, as was given to it in the case above stated in construing the Act of June 6, 1900.

Senator Carter in his introduction to the Alaska Code, upon this same question uses the following language:

"On May 17, 1884, just seventeen years, less thirty-four days, after the treaty of cession was ratified, an act entitled, 'An act providing a civil government for Alaska' was approved. Section 7 of the act provided 'That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable, and not in conflict with the provisions of this act, or the laws of the United States.'

"Inasmuch as the laws of Oregon had not been compiled for many years prior to 1884, it was something of a task to determine what the law of that State was on the day the act of Congress was approved, and a task more difficult still to ascertain with precision how far a given law of the State was applicable to the unique Alaskan conditions and not in conflict with any law of the United States. The resulting doubts embarrassed the courts and the bar and sorely perplexed the people.

"Such, however, was the state of the law in Alaska for the ensuing fifteen years. In 1898 Congress became deeply impressed with the growing importance of Alaska and thoroughly conscious of its duty to that long-neglected part of our possessions. The result was the passage of an act entitled 'An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes,' approved May 14, 1898. Also an act en-

titled 'An act to punish crimes in the District of Alaska and to provide a code of criminal procedure for said district,' approved March 3, 1899; and finally an act entitled 'An act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900.

"The two acts last named embrace a criminal code, a code of criminal procedure, a political code, a code of civil procedure, a civil code, and certain license taxes for the district. The codes were mainly copied from the statutes of the State of Oregon, and to the end that adjudications by the Supreme Court of that State might remain as directly in point as possible, changes were sparingly made in the text of sections."

Mr. Charlton in his compilation of the acts of Congress relating to Alaska, Senate Document No. 142, published January 10, 1906, page 7, uses the following language:

"Organization of Civil Government.

"Prior to the year 1884, Alaskan legislation was confined almost entirely to the protection of the seal fisheries and other fur interests of the district. Offenses against the laws were prosecuted in the district courts of the United States in California, Oregon, or Washington. By the Civil Government Act of 1884 the office of governor of the district was created, and Alaska was made a civil and judicial district; the clerk of the court acting as *ex officio* secretary and treasurer of the district. The act provides specifically that there shall be no legislative assembly in the district, and that no dele-

gate shall be sent to Congress therefrom. The laws of the State of Oregon are made applicable to Alaska. The form of government established by this act of 1884 has undergone no substantial change, although the specific provisions of the act have been superseded by later legislation."

Senator Carter in his Code set out by way of annotation the source of every law incorporated, either directly or by implication, in the Code at the foot of each section. In speaking of this he uses the following language:

"Obvious convenience if not actual necessity seems to require that the laws of the district should be annotated and compiled for ready reference."

Wherever a statute of the United States with reference to criminal procedure was adopted, directly or by implication, Senator Carter cited the statute and the particular sections thereof so intended to be adopted in the footnotes to the section. For example, the chapter on Statutes of Limitation, Carter's Code, page 45, also the section modifying the Oregon law and requiring the concurrence of twelve grand jurors in finding a true bill (see section 29, Carter's Code, p. 49). One of the two sections upon which the court below bases the entire theory of his construction, to wit: Section I of part II, Carter's Code, page 44, contains no annotation because it is entirely new matter, and it is obvious that Senator Carter and the other mem-

bers of the committee having the matter in charge did not construe this introductory section as adopting any general laws of criminal procedure of the United States in conflict with the specific provisions of the act. But it is through section 10, by the theory of the opinion of the lower court, that section 1024 of the Revised Statutes of the United States is read into the Alaska law and made a part thereof. It is by this section that the dual system of procedure, in the opinion of the lower court, an exception to the general rule, becomes effective in this Territory. Let us see the contemporary construction placed upon it by the author of the act.

Carter's Code, p. 46, section 10, and following annotations.

R. S., sections 808, 809, 810.

We have here, then, an authoritative statement from the author of the Code, made within a very short time after its passage, as to what portions of the Revised Statutes of the United States were thereby incorporated into the Code by reference or implication. The sections above referred to are sections of chapter 15, Revised Statutes, on juries. Section 808 refers to the number of grand jurors and the method of completing the grand jury where an insufficient number qualify. Section 809 provides for the appointment of a foreman by the court and gives him power to administer oaths. Section 810 provides for the manner in which the judge of the court shall order a grand jury to be

summoned. It appears, then, that by reason of the enactments of section 10 Senator Carter has not read into the Alaska act the *general criminal procedure* of the United States for any purpose; he has taken the common, ordinary meaning of the words "proceedings of the grand jury," and read into the act by implication those sections alone which refer to the drawing and to the proceedings of the grand jury as a deliberative body. Nor is Senator Carter alone in this construction. Mr. Charlton, in his compilation of January 10, 1906, page 156, in the marginal notes cites the following sections as having been read into the act by the adoption of section 10, to wit: R. S., sections 808-810, and section 4, chap. 114, 1 Supplement Revised Statutes, page 68. The only difference between Mr. Charlton's annotation and Senator Carter's is that Mr. Charlton has added section 4 of chapter 114, 1 Supplement R. S. This is that section of the Civil Rights Act of March 1, 1875, which provides that no person shall be disqualified as a grand or petit juror on account of race, color, or previous condition of servitude. In the lower court no consideration was given to these authoritative and contemporary constructions given by the compilers of the only two Alaska codes in existence.

In closing this discussion, with all due respect to the opinion of the lower court and to the ingenious contention of the United States attorney, we cannot refrain from saying that the theory of dual procedure in territorial courts, no matter

how plausible or how ingenious it may have been originally, became a dead theory after the thorough and serious consideration given to it between 1870 and 1880 by the Supreme Court of the United States. Nor has the prosecution any right to expect to revive this theory by claiming Alaska as an exception to the general rule prevailing in other Territories. The adoption by the lower court of this theory, together with the ingenious reconstruction of section 10, we submit is without warrant in view of the well-established principles with reference to the controlling doctrine of the superiority of local procedure and with the prevailing and already fully-accepted doctrine that the codifications of 1899 and 1900 were simply a re-enactment of so much of the Oregon law as was not locally inapplicable to the conditions in the District of Alaska. In this connection, we cannot refrain from quoting from the appropriate language of the Supreme Court of Louisiana in *Childers vs. Johnson*, 6 La. Ann., 634:

“One of these presumptions is that the legislature does not intend to make any change in the laws beyond what it *explicitly* declares either in *express terms* or by the *unmistakable implication*, or, in other words, beyond the immediate scope and object of the statute. * * * It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with clearness; to give any such effect

to general words, simply because in their widest and, perhaps, natural sense they have that meaning, would be to give them *a meaning in which they are not really used.*"

Recapitulation.

At the risk of being tedious, we shall venture to recapitulate the main points in this argument, so that they may be understood, in a few words.

First. Section 1024 of the Revised Statutes of the United States, adopted by Act of February 26, 1853, had no application whatever to any courts except United States circuit and district courts. No provisions of the act have ever been applied to territorial courts except provisions with reference to fees in those particular cases wherein by subsequent legislation the provisions of the act were extended to certain Territories specifically named. Alaska was not one of these Territories.

Repeated decisions in unmistakable language have held that the District Court for the District of Alaska is not a United States circuit or district court.

Second. No rule of law in the Supreme Court and in the Circuit Court of Appeals is better established than that the local procedure adopted for a Territory controls and has application instead of the general rules of procedure relating to Federal practice.

Nor is any rule of law better settled that, while a *jurisdiction* may exist in a territorial court (which in States would be dual), there is no such doctrine as the doctrine of *dual procedure*.

Third. Observing all of these rules, Congress has found it necessary in particular instances, such as bigamy and kindred crimes, to specially authorize the statement of more than one crime in the indictment so as to obviate the necessity of following the local statutes, but no such acts of Congress apply to the crimes charged in the indictment in this case.

Fourth. That that chapter of the laws of Oregon governing the drawing of indictments has been specifically recognized as the law by which indictments are to be tested in Alaska.

Fifth. That if the new Code of Criminal Procedure by the introductory section, section 1, is to be limited in its application to the crimes defined in title I of the Act of March 3, 1899, then the old law prevails with respect to other crimes, and should be applied as it is applied in the Fitzpatrick case, and this case must, nevertheless, be reversed.

Sixth. Applying, however, the true test to the Alaska Code of 1899 and 1900, it must be construed as a compilation of the Oregon laws previously in

effect and found to be applicable to the conditions in the district. That the old law was not changed, and that, by reason of the presumption against the change of the law and against implied repeal, and by reason of the annotations and explanations given by the compilers of the law, section 1024 was never made applicable to the District of Alaska, and this case is governed by the rule laid down in section 43, part II, of the Code of Criminal Procedure.

Second Specification of Error.

Seventh. IF THE THEORY OF THE LOWER COURT SHOULD BE ADOPTED, GIVING A RESTRICTIVE CONSTRUCTION TO THE INTRODUCTION OF PART II OF THE CRIMINAL CODE, THEN THE SAME THEORY MUST BE EXTENDED TO THE INTRODUCTION OF PART I OF THE CRIMINAL CODE AND SECTION 5209 OF THE REVISED STATUTES RELATING TO OFFENSES AGAINST THE NATIONAL BANKING LAW MUST BE HELD NOT APPLICABLE TO THE DISTRICT.

If this court should hold that the lower court was correct in its construction of section 1, part II, of the Alaska Criminal Code of Procedure, and that by reason of the peculiar language of that section the application of section 43 of part II is to be strictly limited, then the same force and effect and the same restricted construction must be given to the introductory language to part I of the Criminal Code, which is as follows:

“That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:”;

which would result in the inevitable conclusion that no criminal laws of the United States were applicable to Alaska except those defined and made punishable by the provisions of the Act of March 3, 1899, and the inevitable result would be that this court must hold that unless section 5209 has been made applicable to the District of Alaska subsequent to March 3, 1899, any acts thereby denounced do not constitute a crime within the district.

An examination of the United States statutes since March, 1899, shows conclusively that the acts denounced as crimes by section 5209 have not since been declared to be crimes in the district. For the above reason, then, if this court should concur with the lower court in its theory of restricted construction, it must necessarily hold that the indictment as a whole and none of the counts thereof stated a crime, and further hold that the grand jury had no legal authority to inquire into the charge. Both of these points were taken in the demurrer and overruled by the lower court.

Third Specification of Error.

Eighth. THE RECORD IN THIS CASE DOES NOT SUSTAIN THE JUDGMENT.

When the defendant in this case ascertained that, contrary to the provisions of section 43 of the Alaska Code of Criminal Procedure, he was going to be forced to trial upon fifty-six separate crimes, he elected to stand upon his demurrer pursuant to section 97, Alaska Code of Criminal Procedure, and thereupon sentence was imposed upon him without trial, and a judgment of conviction on each of the counts rendered against him. Claiming the protection thereof, the plaintiff in error makes the objection that he was thereby deprived of the protection of the Sixth Amendment to the Constitution of the United States.

It is possible that the claim will be made by the United States attorney that the defendant waived his right to the jury trial which is guaranteed to him by the Constitution of the United States as applied in the case of

Rasmussen vs. United States, 197 U. S., p. 516.

But it seems that the right cannot be waived.
Thompson vs. Utah, 170 U. S., 343.

We do not apprehend that the United States will be permitted to take advantage of the only effort that the defendant could make *to prevent, before trial*, the denial to him of the benefit of the provisions of section 43. If the decision of the lower court be sustained, certainly this court will not permit a judgment to stand which is based on local practice, because if sustained at all it must be on the theory that the local practice does not apply.

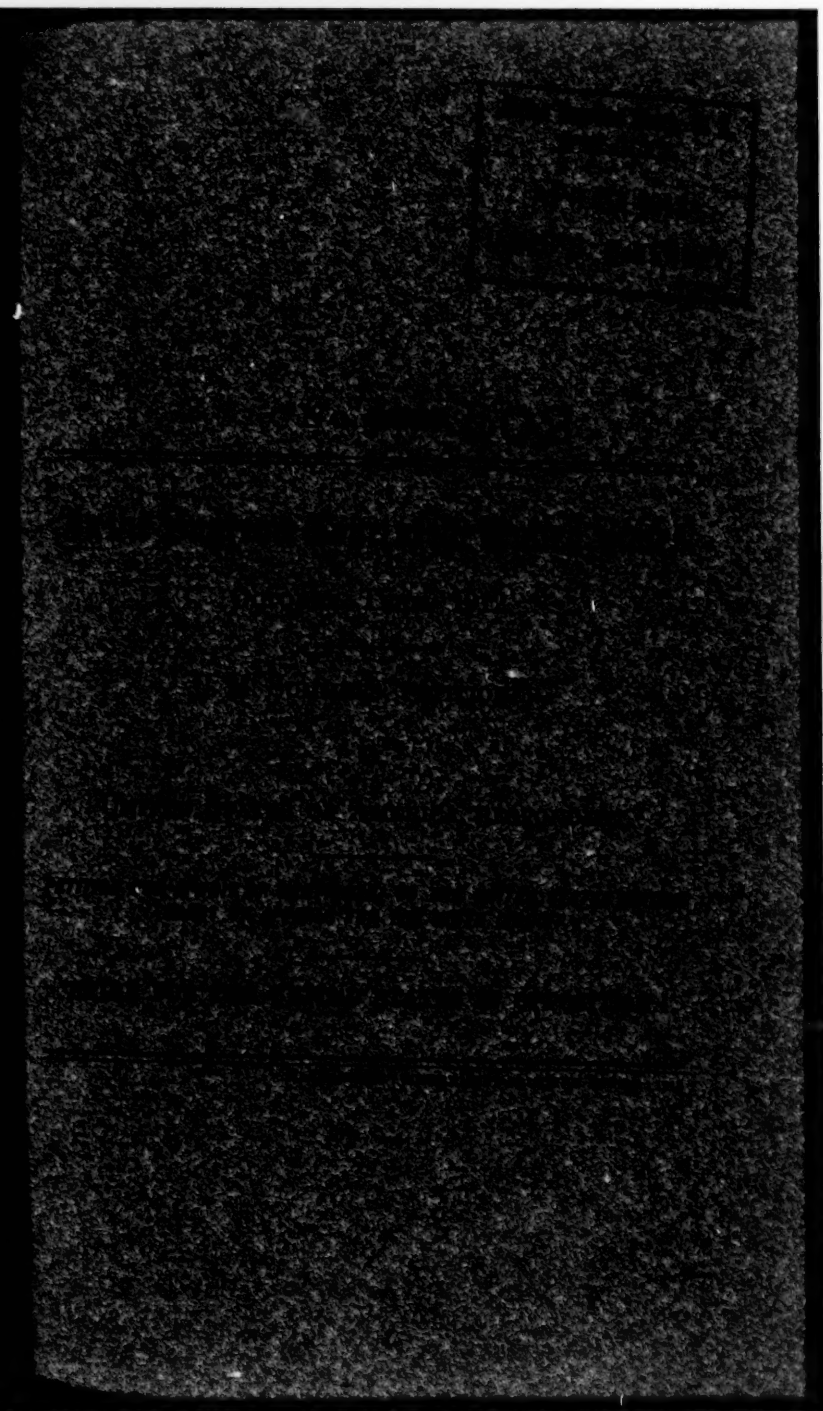
We respectfully submit that the demurrer to the indictment should have been sustained and that the judgment of the lower court in this case should be set aside.

Respectfully submitted,

L. P. SHACKLEFORD,

SHACKLEFORD & BAYLESS,

Attorneys for Plaintiff in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

C. M. SUMMERS, PETITIONER,	}	No. 1045.
v.		
UNITED STATES OF AMERICA, RESPON- dent.		

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.*

BRIEF FOR THE UNITED STATES IN OPPOSITION.

This case does not involve the right to trial by jury on a charge of crime, but presents simply a question of pleading—whether an indictment found in the district court for Alaska for violating the national banking law may contain more than one count.

Petitioner, who was president of a national bank in Juneau, was indicted for violating section 5209 of the Revised Statutes, and, as is usual in such cases, the indictment contained a number of counts, 56 in all; the counts charged the making of false entries in the books of the bank and in the reports to the Comptroller of the Currency and the abstraction and misapplication of the funds of the bank.

Petitioner's demurrer, based on the ground of misjoinder was overruled, and he pleaded not guilty. (R.,

142-144.) Instead of going to trial, he later withdrew his plea, and reentered his demurrer, which was again overruled. (R., 163-4.)

Petitioner then moved for a continuance. (R., 164.) Evidently this motion was about to be denied, and an immediate trial had, when he gave notice of his election to stand on his demurrer and not further plead, to take advantage of section 97 of the Alaska Criminal Code of Procedure, to submit to judgment on his demurrer, and to forthwith appeal to the Circuit Court of Appeals. (R., 171, 2.) The United States attorney objected to this course, urging that the court enter a plea of not guilty for petitioner (R., 172), and the matter was argued on both sides. The court concluded that petitioner might lawfully stand on his demurrer and be sentenced, and imposed the minimum sentence of five years. (R., 180-185.) When petitioner was asked if he had anything to say why sentence should not be pronounced against him, he answered that he had nothing to say except that he desired "to test his demurrer upon appeal." (R., 184.)

In short, the question was whether the petitioner should be tried on one indictment containing 56 counts, or on 56 indictments of one count each, and which might have been consolidated for trial in the discretion of the trial court. As a practical matter the question seems of little importance.

Petitioner properly raised his question by demurrer and was in a position to avail himself of the point on appeal if he should be convicted. Instead

of pursuing the orderly procedure, he insisted upon staking his entire case on this one question of pleading, and there is no reason why this court should issue the extraordinary writ of certiorari to enable him to test his question for the third time.

Petitioner having thus induced the trial court to impose sentence on him, now urges that he led the court into error because the sentence deprived him of his constitutional right to trial by jury and was therefore illegal.

Even if the petitioner were deprived of a constitutional right, the fact that such deprivation was the result of his own urgent solicitation will not be very persuasive in inducing this court to come to his relief.

But the petitioner was not deprived of any right. In fact, his counsel did not think enough of the proposition to put it in the assignment of errors (R., 189).

Petitioner was, of course, entitled to a trial by jury, but he could waive the right either by pleading guilty or by standing on his demurrer and submitting to judgment.

In fact, the common-law rule was that on a charge of felony the defendant had no right to plead over if his demurrer were overruled, but that sentence must be imposed.

Reg v. Fadermann, 4 Cox, C. C. 359.

People v. Taylor, 3 Denio, 91.

Archbold Cr. Pl. (24th ed., 1910) 174.

Wharton's Cr. Pl. & Pr., secs. 404, 405.

And section 97 of the Alaskan Code recognized this common-law rule, but gave the option of pleading over.

It appears in this case, that the petitioner was given his choice, and that he deliberately placed his entire reliance on his demurrer, and accepted sentence rather than go to trial. Surely the circumstances do not require the issue by this court of the extraordinary writ of certiorari.

JESSE C. ADKINS,
Assistant Attorney General.

APRIL 18, 1913.



U. S. Supreme Court, U. S.
FILED.

SEP 19 1913

JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

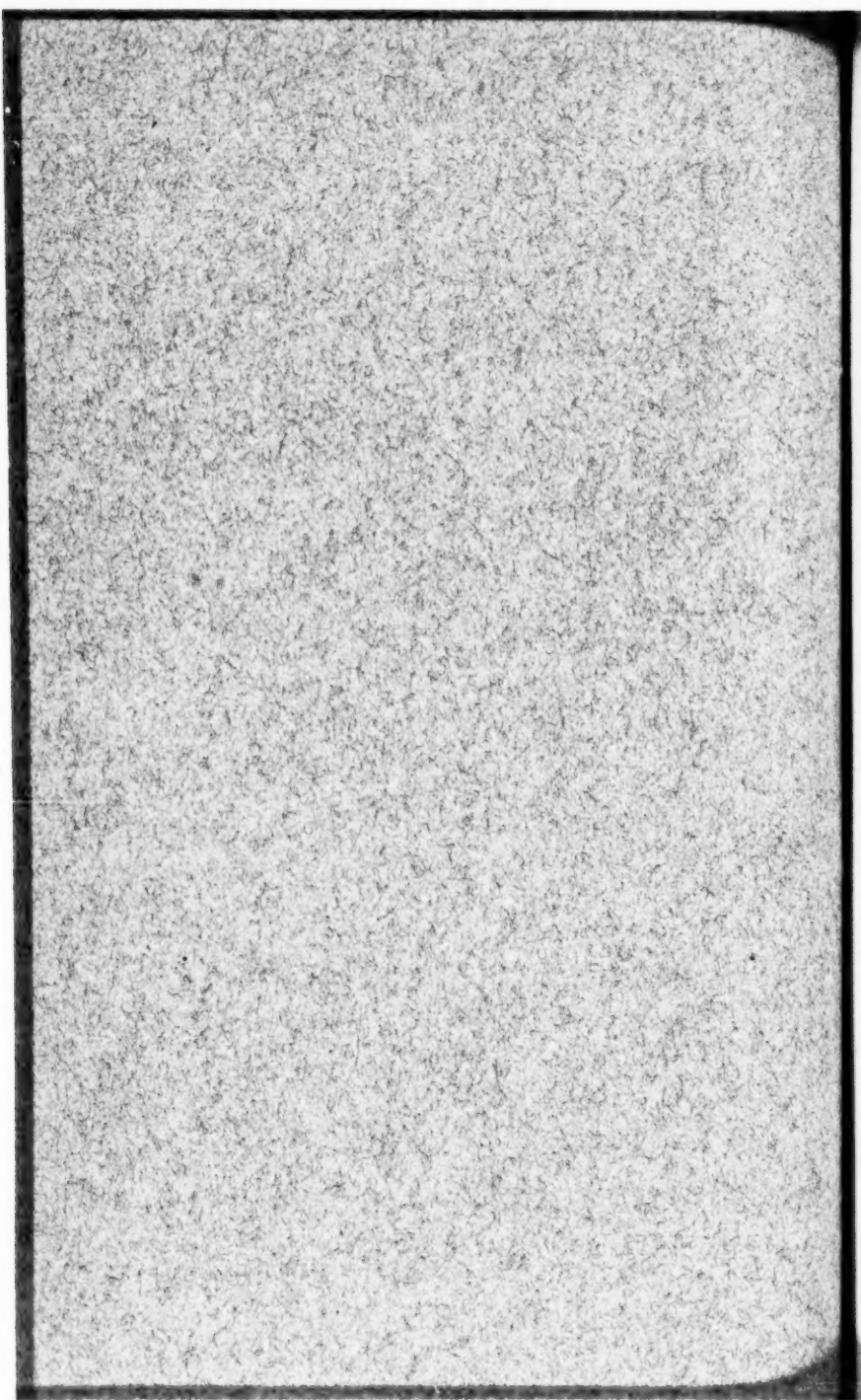
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

ALBERT FINK,
LEWIS P. SHACKLEFORD,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
KURNAL R. BABBITT,
Attorneys for Petitioner.

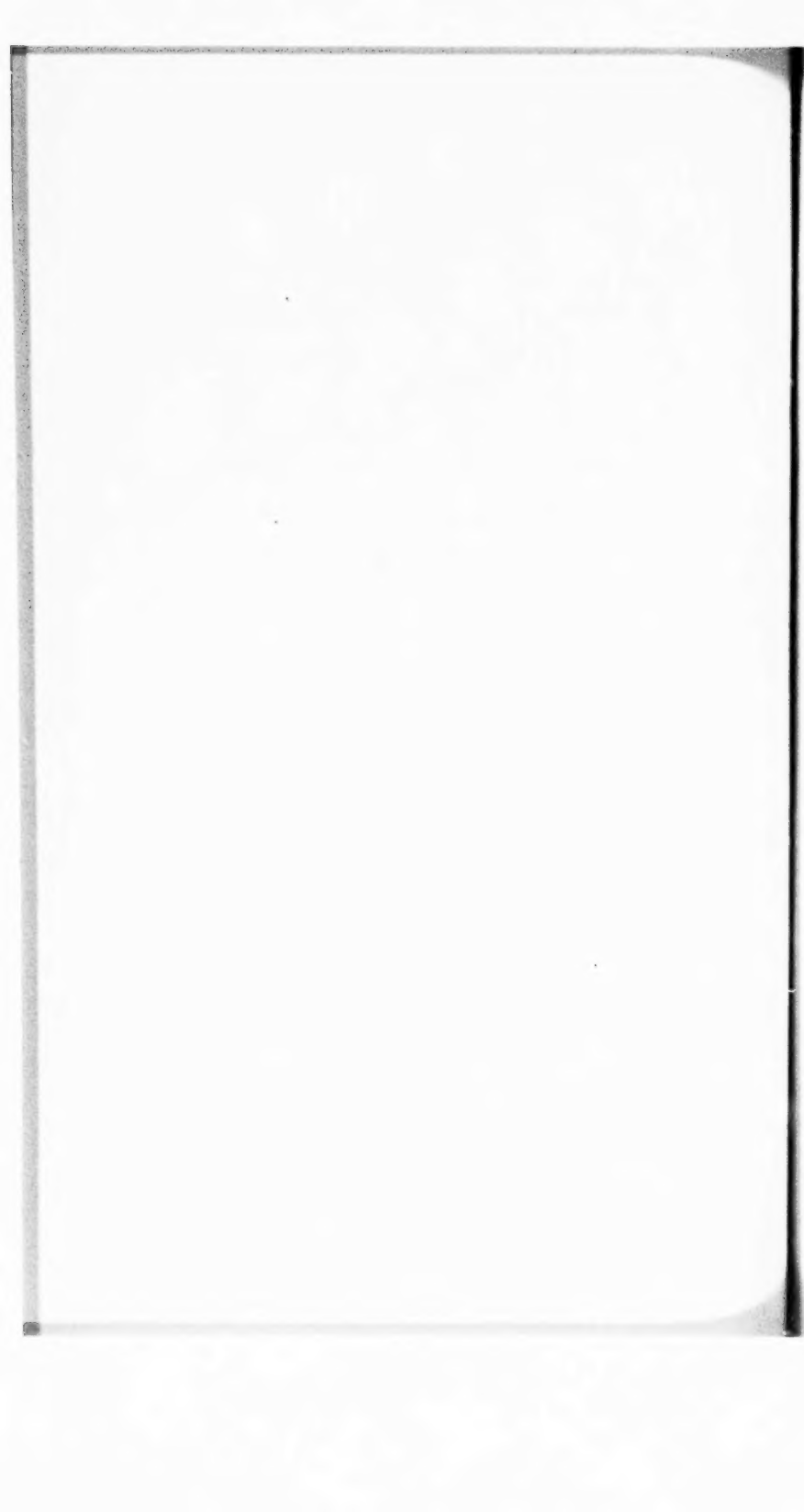


SUBJECT INDEX.

	Page
Statement	1-4
Assignment of errors	4
Argument	5-36
I. The court erred in overruling the contention of the petitioner that the indictment was demurrable because it charged more than one crime.....	5-28
II. The court erred in entering judgment against and sentencing the petitioner, since it is not within the power of a judge in a criminal case, in the absence of a plea of guilty, to make a finding of fact as to the guilt of a defendant unless a finding of fact to the same effect has been made previously by a jury of twelve men pursuant to the Constitution of the United States.....	29-36
Appendix A—Oral opinion of trial court.....	37-41

CASES CITED.

Ball <i>vs.</i> United States, 147 Fed., 32.....	7, 26
Binns <i>vs.</i> United States, 194 U. S., 486.....	8
Callan <i>vs.</i> Wilson, 127 U. S., 540.....	29, 33
Cancemi <i>vs.</i> People, 18 N. Y., 131.....	31-32
Clinton <i>vs.</i> Englebrecht, 13 Wall., 434.....	10, 14, 19
Cochran <i>vs.</i> United States, 147 Fed., 206.....	6-7
Coquitlam, The, <i>vs.</i> United States, 163 U. S., 346.....	8, 14, 17-19
Corbus <i>vs.</i> Leonhardt, 114 Fed., 10.....	7, 12-14, 19, 20
Endleman <i>vs.</i> United States, 86 Fed., 456.....	7, 16
Fitzpatrick <i>vs.</i> United States, 178 U. S., 304.....	10, 11, 12, 15
Good <i>vs.</i> Martin, 95 U. S., 90.....	12, 14, 19, 20
Hornbuckle <i>vs.</i> Toombs, 18 Wall., 648.....	12, 14
Interstate Commerce Commission <i>vs.</i> United States <i>ex rel.</i> Humboldt S. S. Co., 224 U. S., 474.....	8
Jackson <i>vs.</i> United States, 102 Fed., 473.....	7
Keliher <i>vs.</i> United States, 193 Fed., 8.....	32-33
McAllister <i>vs.</i> United States, 141 U. S., 174.....	14, 17
Miles <i>vs.</i> United States, 103 U. S., 304.....	12
Page <i>vs.</i> Burnstine, 102 U. S., 664.....	12, 14
Rasmussen <i>vs.</i> United States, 197 U. S., 516.....	8, 30-31, 33
Reynolds <i>vs.</i> United States, 98 U. S., 145.....	12
Schick <i>vs.</i> United States, 195 U. S., 65.....	29-30
Thiede <i>vs.</i> Utah, 159 U. S., 510.....	14, 20-21
Thompson <i>vs.</i> Utah, 170 U. S., 343.....	31, 33
United States <i>vs.</i> Haskell, 169 Fed., 449.....	7
United States <i>vs.</i> Pridgeon, 153 U. S., 48.....	9
Welty <i>vs.</i> United States, 76 Pac. (Okla.), 121.....	7



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

Statement.

On the 5th day of January, 1912, the petitioner was indicted in the District Court for the Territory of Alaska, Division Number One. The indictment charged the petitioner with 56 separate and distinct crimes in violation of section 5209 of the Revised Statutes of the United States relating to National banks (Tr., pp. 2-136). Petitioner in-

terposed his demurrer to the indictment upon the ground, among others, that more than one crime was charged in the indictment, which demurrer was based upon the act of the Legislature of the State of Oregon, approved October 19, 1864, providing a criminal procedure for the State of Oregon, which contained the following provision:

"That the indictment must charge but one crime and in one form only."

The provision of law above quoted was adopted as the law of Alaska on the 17th day of May, 1884, by virtue of the provisions of the act of Congress approved May 17, 1884, entitled "An act providing civil government for Alaska," section 7 of which act reads as follows (23 Stat. L., 25-26):

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

The provision above quoted from the laws of Oregon was carried into the laws of Alaska and is found in Carter's Code of Alaska, Title II, section 43 (30 Stat. L., 1253).

On May 18, 1912, the demurrer of the petitioner, after argument, was overruled, and the petitioner was allowed to and did except to such ruling of the court (Tr., pp. 163-164). Thereupon the petitioner herein gave his written notice of election to stand upon said demurrer and refused to plead further to the indictment (Tr., pp. 171-172). The trial court construed this election to stand upon the demurrer and refusal to plead further as a waiver of trial by jury (Tr., p. 181), and proceeded without any trial whatever to pronounce judgment and sentence upon petitioner herein, adjudging him guilty of each one of the 56 crimes with which he was charged in said indictment, and sentenced the petitioner to five years' imprisonment for each one of the 56 crimes charged in the indict-

ment, providing that the sentences might be served concurrently (Tr., pp. 182-185). The petitioner duly excepted to the whole of said judgment and sentence, and to each and every part thereof, which exceptions were duly allowed (Tr., p. 185). Immediately thereafter the petitioner filed his petition for writ of error and assignment of errors (Tr., pp. 188-191), and the cause was removed by writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

On the 3d day of February, 1913, the United States Circuit Court of Appeals for the Ninth Circuit rendered an opinion affirming the judgment of the District Court for the Territory of Alaska, Division Number One (Tr., pp. 203-213), and such proceedings were subsequently had that this case was transferred from the said United States Circuit Court of Appeals of the Ninth Circuit to this court by writ of certiorari (Tr., pp. 217-224). Subsequently on May 1, 1913, the Attorney-General moved to advance the case upon the ground that if the demurrer should be sustained new indictments would be necessary, and that they should be filed as quickly as possible in order to avoid the bar of the Statute of Limitations. The petitioner joined in said motion and the motion was granted and the case advanced upon the docket of this court.

There are two questions involved in the case:

First. May more than one offense be joined in an indictment in the Territory of Alaska?

Second. Was it within the power of the trial court under the Constitution of the United States to adjudge the petitioner guilty and sentence him without a trial by jury, where no plea of guilty had been entered by him?

The two questions above stated were raised by exceptions to the judgment of the lower court above recited (Tr., p. 185), and by assignments of error to the effect that the court

erred in overruling the demurrer of the defendant upon the third ground of said demurrer (that more than one crime was charged in the indictment). See 4th assignment of error (Tr., p. 190), and by the 7th, 8th, and 9th assignments of error (Tr., p. 190), to the effect that the court erred in entering judgment against the defendant and in sentencing the defendant under said judgment.

Assignment of Errors.

It is our contention that the court erred:

First. In overruling the demurrer of the petitioner to the indictment herein upon the 4th ground stated in said demurrer, to wit, that more than one crime was charged in the indictment.

Second. That the court erred in entering judgment against the petitioner upon all and each and every one of the 56 counts in the indictment upon the record herein, and further erred in sentencing the petitioner under said judgment.

ARGUMENT.

I.

The court erred in overruling the contention of the petitioner that the indictment was demurrable because it charged more than one crime.

The laws of Oregon adopted May 17, 1884, for the District of Alaska provide "That the indictment shall charge but one crime." Section 1024 of the Revised Statutes of the United States permits the joinder of a number of offenses in one indictment. The question raised by the demurrer is: *Does the local practice adopted as the law of a Territory control the procedure of the territorial courts or do the provisions of the Revised Statutes of the United States providing primarily a mode of procedure in United States Circuit and District courts apply to the territorial courts?*

Annexed to this brief will be found a copy of the opinion of the trial court on the questions involved in this case (Appendix A). The copy of the court's remarks is taken from the appendix to the brief of the attorney for the District of Alaska, Division No. 1, in the Circuit Court of Appeals. The following is the language of the trial court in passing upon the question in controversy:

"Is there anything incompatible with saying that this is not a court of the United States in the constitutional sense and the ruling of the court on this occasion? I think not, Mr. Shackelford. I concur with you when you say that it is not a court of the United States in a constitutional sense. I will go further with you and agree with you that when acts of Congress mention courts of the United States they do not mean this court, because this is a territorial court pure and simple but it exercises the jurisdiction of courts of the United States and when it exercises the jurisdiction of courts of the United States and when Con-

gress says that all laws not locally inapplicable are transferred to the District of Alaska, then it seems to me that it is a perfectly natural construction to give it, although it is not a court of the United States. Yet when it is sitting and exercising that jurisdiction to enforce the laws of the United States, unless there is some negating act of Congress withdrawing from it the right to use the procedure which the Federal courts use under that section of the act of Congress, it is a natural and reasonable construction to give it that not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law applies, and unless I am wrong in the ruling in the transportation case, I am satisfied that the court is right now, because one could not be correct in my judgment and the other incorrect, because if a portion of the procedure is applicable the whole of it is applicable."

We contend, therefore, that the ruling of the trial court in this case, establishing a dual system of procedure in the territory, is directly in conflict with one of the most definitely settled rules of the Supreme Court of the United States, a rule which has been settled by a line of decisions which has never before been disregarded. The ruling of the lower court and of the Circuit Court of Appeals in this case reverses not less than six distinct announcements of the rule by this court, and not less than five distinct announcements of the same rule by various circuit courts of appeals, including previous rulings of the Circuit Court of Appeals for the Ninth Circuit.

The most important cases in this court relied upon by the petitioner have recently been collected, and the rule has been most clearly stated, in a decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Cochran vs. United States*, 147 Fed., 206, 207, in which the court, speaking through Van Devanter, J., said:

"It is important, therefore, to inquire whether the territorial district court, when exercising the jurisdiction of the Circuit and District Courts of the

United States in the trial of an offense against the laws of the United States, should conform to the practice and modes of proceeding in the Circuit and District Courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated decisions of the Supreme Court of the United States. *Reynolds v. United States*, 98 U. S., 145, 154; 25 L. Ed., 244; *Miles v. United States*, 103 U. S., 304, 310; 26 L. Ed., 481; *Clinton v. Englebrecht*, 13 Wall., 434, 447; 20 L. Ed., 659; *Hornbuckle v. Toombs*, 18 Wall., 648; 21 L. Ed., 966; *Good v. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341. These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, are not courts of the United States, but legislative courts of the territories; that the practice and modes of proceeding, including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specifically provided by some law of the United States."

A comparison of the language used by the lower court and the rule announced above demonstrates, we submit, a direct conflict between the rule of this court and the ruling of the trial court in the case at bar. In addition to the cases cited by Mr. Justice Van Devanter in the above quotation, the same proposition is plainly announced in the following cases:

Welty vs. United States, 76 Pacific (Okla.), 121;
United States vs. Haskell, 169 Fed., 449,

and in the following cases decided by the Circuit Court of Appeals for the Ninth Circuit:

Eudelman vs. United States, 86 Fed., 456,
Jackson vs. United States, 102 Fed., 473,
Corbus vs. Leonhardt, 114 Fed., 10,
Ball vs. United States, 147 Fed., 32.

Obviously, then, if Alaska is "a Territory of the United States" the rule above announced must apply to Alaska the same as it does to any other Territory of the United States. If the Circuit Court of Appeals and the trial court are in error in differentiating Alaska from the other Territories, then the rule with reference to the other Territories must apply, and we respectfully submit that the case should be reversed.

That Alaska stands on exactly the same footing as all of the other Territories of the United States was finally and conclusively decided by this court in a very recent case, which decision was rendered by this court subsequent to the indictment of the petitioner herein. *Interstate Commerce Commission vs. United States ex rel. Humboldt S. S. Co.*, 224 U. S., 474. All of the previous authorities with reference to the status of Alaska were reviewed, and it was there distinctly held that Alaska is an organized Territory of the United States.

To the same point see—

The Coquitlam vs. United States, 163 U. S., 346.

Binns vs. United States, 194 U. S., 486.

Rasmussen vs. United States, 197 U. S., 516.

We submit, therefore, that the decision of the lower court in this cause is in conflict with the cases just above cited.

It is said by the Circuit Court of Appeals in effect (Tr. 205) that the provisions of the act of May 12, 1884 (23 Stat. L., 24), place Alaska in a different position with reference to the legislation adopted from that of the other Territories. The reason assigned is that the laws of Oregon were declared to be the laws of the district "so far as the same may be applicable and not in conflict with the provisions of the laws of the United States." In the opinion of the Circuit Court of Appeals it is claimed, therefore, that the law of Oregon prohibiting the statement of more than one crime in the indictment is not only in apparent conflict, but in actual conflict, with section 1024 Rev. Stat., a law of the

United States, and that therefore the provision of the Oregon law was not adopted as a part of the law of the district of Alaska.

The Circuit Court of Appeals has ignored the language of this court in the case of the *United States vs. Pridgeon*, 153 U. S., 48, cited in the briefs when the case was submitted in the Circuit Court of Appeals. In discussing the adoption of the law of Nebraska upon the organization of the Territory of Oklahoma in the Pridgeon case this court quoted with approval the following language (p. 53, quoted from *Ex parte Larkin*, 1 Okla., 53, 57):

"It was intended by Congress that the laws of Nebraska should constitute a *Territorial Code* as distinguished from the laws of the United States in force in the Territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

Let us see if there is any real difference between the situation created by the adoption of the laws of Oregon for the district of Alaska and that arising upon the passage of any territorial act by a territorial legislature upon the same subject. In the first place it must be conceded that no law passed by a territorial legislature which is in actual conflict with a law of the United States can have any effect. In the second place it must be remembered that the territorial legislatures were prohibited from passing any laws which were inconsistent with the laws of the United States. Section 1851 of the Revised Statutes of the United States reads as follows:

"The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Section 1891 provides:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

It is said by the Circuit Court of Appeals and by the trial court that these provisions of law made the Oregon statute prohibiting the statement of more than one crime in an indictment ineffective in the District of Alaska, because section 1024 is a law of the United States. If this reasoning is correct, then the decisions of this court in the cases heretofore cited, commencing with *Clinton vs. Englebrecht*, 13 Wall., 434, and ending with *Fitzpatrick vs. United States*, 178 U. S., 304, are all in error, because the sections of the Revised Statutes above quoted were in effect at the time those decisions were announced by this court.

We respectfully submit that the trial court and the court of appeals have entirely misconceived the process of reasoning adopted by this court in these leading cases. In every one of those cases there was a law of the United States apparently in conflict with a law of the Territory, but this court held that the conflict, although apparent, was not actual because the statutes of procedure found in the Revised Statutes, unless some specific intention to the contrary is to be gathered therefrom, are to be construed as applicable only in the United States District and Circuit courts. In other words, this court has held that the scope of the two conflicting sets of procedure is defined and therefore that there is no real conflict. It must be admitted that the restriction in the act extending the laws of Oregon to Alaska is of no more force and effect than the restriction placed upon legislation by a territorial legislature, and for this reason we submit that the attempt to differentiate Alaska from the other Territories in this respect is without any basis whatever.

The opinion of the trial court and of the court below establishes a condition in Alaska which has never existed in the other Territories, namely, a dual system of procedure. That is to say, the territorial court of Alaska when sitting in judgment upon a local offense is controlled by the code of local procedure in criminal matters, whereas when sitting in judgment upon an offense against the general laws of the United States it acts in the capacity of a United States Circuit or District Court and is governed by those statutes of procedure which were intended to control the proceedings of such a court. This is the very situation which this court has from time to time condemned with reference to the Territory. In applying this rejected rule of dual procedure to Alaska, the Circuit Court of Appeals asserts that the case of *Fitzpatrick vs. United States*, 178 U. S., 304, is not in point. In that case Fitzpatrick was indicted for murder under a general provision of the substantive law of the United States, to wit, under section 5339 Rev. Stat. The contention was made on behalf of Fitzpatrick that the sufficiency of the indictment should be tested by those rules which would prevail if he were on trial in a United States Circuit or District Court. In discussing this very point Mr. Justice Brown said (pp. 307-308) :

"By section 7 of an act providing civil government for Alaska, approved May 17, 1884, c. 53, 23 Stat., 24, it is enacted 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' We are, therefore, to look to the law of Oregon and the interpretation put thereon by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law."

We submit that the very thing that the petitioner in this case is insisting upon is that his indictment shall be tested

by the laws of Oregon, and we insist further that those statutes of Oregon which refer to the form and substance of the indictment were, by virtue of the decision in the Fitzpatrick case, made the criteria by which indictments should be tested in Alaska, whether the crime is of a local nature or whether it consists in a violation of some provision of a Federal statute.

The Circuit Court of Appeals in its opinion admits the existence of the doctrine laid down in the cases of *Hornbuckle vs. Toombs*, 18 Wall., 648; *Good vs. Martin*, 95 U. S., 90; *Reynolds vs. United States*, 98 U. S., 145; *Miles vs. United States*, 103 U. S., 304, and *Fitzpatrick vs. United States*, 178 U. S., 304, and then proceeds (Tr., 211-212) to hold that these authorities have no application to the Territory of Alaska because of the decision of this court in the case of *Page vs. Burnstine*, 102 U. S., 664.

The case cited and relied upon by the Circuit Court of Appeals involved the application of section 858 of the Revised Statutes to the District of Columbia. In applying this case to the Territory of Alaska the Circuit Court of Appeals has ignored the qualifications put upon the case at the time it was decided by this court, and has ignored the construction which it had previously placed upon the case of *Page vs. Burnstine* with reference to its application to Alaska.

In the case of *Corbus vs. Leonhardt*, 114 Fed., 10, the Circuit Court of Appeals for the Ninth Circuit had before it the question as to whether section 858 of the Revised Statutes was a rule of procedure in the District Court for the District of Alaska. The court said (pp. 12-13):

"1. The objections presented by the first assignment of error are based upon the ground that the testimony of Dr. Leonhardt comes within the provisions of section 858, Rev. St., and that by this section he was not a competent witness to any transactions and conversations between himself and defendant's intestate. We are of opinion that the court did not err in admitting the testimony objected to. It is,

perhaps, true, as claimed by the plaintiff in error, that there is no decision directly in point, but the decisions bearing upon the general question lead us to the conclusion that section 858 does not apply to territorial courts. *Good v. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341; *McAllister v. U. S.*, 141 U. S., 174; 11 Sup. Ct., 949; 45 L. Ed., 693; *Thiede v. Utah*, 159 U. S., 510, 515; 16 Sup. Ct., 62; 40 L. Ed., 237; *The Coquitlam v. U. S.*, 163 U. S., 346, 351; 16 Sup. Ct., 1117; 41 L. Ed., 184; *Jackson v. U. S.*, 42 C. C. A., 452; 102 Fed., 473, 479.

"In *Good vs. Martin*, *supra*, the court said:

"Territorial courts are not courts of the United States, within the meaning of the Constitution, as appears by all the authorities. *Clinton v. Englebrecht*, 13 Wall., 434; 20 L. Ed., 659; *Hornbuckle v. Toombs*, 18 Wall., 648; 21 L. Ed., 966. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to or interested in the issue tried, but the provision has no application in the courts of a Territory where a different rule prevails."

"Page *vs. Burnstine*, 102 U. S., 664; 26 L. Ed., 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the act providing a government for the District of Columbia, *which are not applicable to Alaska*. In the course of the opinion the court said:

"These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts."

"By provision of section 3 of the 'Act providing a civil government for Alaska,' approved May 17, 1884 (23 Stat., 24), there was 'established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States.' By section 7 of this act it was provided 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the

same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' At the time this law was enacted there were no restrictions excluding witnesses from testifying in any case. 1 Hill's Ann. Laws Or., sec. 710. These laws were in force in Alaska at the time this suit was brought and at the time of Robert Duncan's death, and were applicable to the proceedings had in this case."

No mention is made by the Circuit Court of Appeals in its opinion in the instant case of its previous decision in the case of *Corbus vs. Leonhardt*. When the case of *Corbus vs. Leonhardt* was decided by the Circuit Court of Appeals that court was evidently of the opinion that the cases of *Clinton vs. Englebrecht*, *Hornbuckle vs. Toombs*, *Good vs. Martin*, *Thiede vs. Utah*, *McAllister vs. United States*, and *The Coquitlam vs. United States*, were controlling authorities on the question of procedure in the Territory of Alaska, and that the case of *Page vs. Burnstine*, 102 U. S., 664, was not such an authority. In the opinion in the case at bar the position of the Circuit Court of Appeals for the Ninth Circuit is entirely reversed. It is distinctly stated that these cases do *not* apply to procedure in the district of Alaska and that the rule in the case of *Page vs. Burnstine* does apply. In view of the language used in the case of *Corbus vs. Leonhardt* we submit that the petitioner in this case had a perfect right to rely upon the validity of his demurrer and refuse to further plead.

The Circuit Court of Appeals in its opinion holds that section 43 of Title II of the act of March 3, 1899 (30 Stat. L., 1253, 1290), which prohibits the charging of more than one crime in an indictment applies only to the crimes denounced in that act, and proceeds to demonstrate that the crime with which this petitioner is charged is not denounced in that act but is an offense against the general laws of the United States. In summing up this part of its decision the Circuit Court of Appeals says (Tr., p. 207):

"In brief the enacting clause provides for the procedure which shall be adopted in enforcing the penal and criminal laws which are contained in the criminal code of Alaska, and no others, and section 43 is a provision regulating procedure."

The answer to this proposition is that if the act of March 3, 1899, providing a criminal code of procedure for the District of Alaska applies only to the proceedings for the punishment of crimes therein defined, then no new or different method was provided for the punishment of crimes not therein defined, and the procedure with reference to crimes not therein defined must be as it had always been before, under the provisions of the Oregon law, extended to Alaska on the 17th of May, 1884 (23 Stat. L., 24), as construed by the Supreme Court of the United States in *Fitzpatrick vs. United States*, 178 U. S., 304, wherein it was decided:

"That we are to look to the laws of Oregon and the interpretation put thereon by the highest court of that State as they stood on the day when this act was passed for the requisites for an indictment."

This proposition we think effectually disposes of the contention that section 43 of the Code of Criminal Procedure of the act of March 3, 1899, has no application to the crime charged in this case for the reason that it makes no difference whether section 43 applies or not, because the Oregon law which was in effect with reference to all procedure in Alaska is, and has been for some twenty or thirty years, the same as section 43. Furthermore, it is evident that there was no intention on the part of Congress to change the pre-existing law by the passage of the act of March 3, 1899. To this point we quote Senator Carter, the author of the act of March 3, 1899 (see introduction to Carter's Code of Alaska, page XVIII):

"The two codes last named embrace a criminal code and a code of criminal procedure; a political code; a code of civil procedure; a civil code and cer-

tain license taxes for the district. The codes were mainly copied from the statutes of the State of Oregon to the end that adjudications by the Supreme Court of that State might remain as directly in point as possible. Changes were sparingly made in the texts of the sections."

When application was made for the writ of certiorari herein, copies of the brief of the plaintiff in error in the Circuit Court of Appeals were filed in this court, and if further investigation of the history of the Alaska statutes is found necessary to the decision of this case, we respectfully request that the said brief be considered a part of this brief, and that the court consider the extended discussion of this point found on pages 33 to 74 thereof.

Before passing from the question of the application of the provision prohibiting the statement of more than one crime in an indictment, we desire to call the attention of the court to the case of *Endleman vs. United States*, 86 Fed., 456, decided by the Circuit Court of Appeals, Ninth Circuit. In that case Endleman was prosecuted for a violation of section 1955 of the Revised Statutes of the United States. The court said (p. 460):

"The second ground of demurrer is that more than one crime is charged in the indictment against the defendant in the same count. Section 7 of the Code providing for the civil government for Alaska (23 Stat. L., 24, 25), declares that the general laws of the State of Oregon then in force are to be the law of said district."

The court then proceeds (pp. 460-461) to test the indictment for the purpose of ascertaining whether more than one crime is charged in the indictment, and the indictment is tested by the provisions of the laws of the State of Oregon. We respectfully submit, therefore, that the present opinion of the Circuit Court of Appeals is a reversal of the position taken by it previously in the case of *Endleman vs. United States*.

The only other proposition advanced in the opinion of the Circuit Court of Appeals in this case is the proposition that section 1024 of the Revised Statutes of the United States has application to procedure in the territorial courts. In fact the language of the Circuit Court of Appeals in this respect is hardly as strong as the proposition above stated. Its language is as follows (Tr., 209) :

“* * * there is no substantial reason why that clause in the act of February 26, 1853 which became section 1024 of the Revised Statutes, does not now apply to all territorial courts as well as to the Circuit and District Courts of the United States in all cases of offenses against the laws of the United States.”

It is to be noted that the proposition above stated again contemplates the long abandoned doctrine of dual procedure in territorial courts. We respectfully submit that the language used by the Circuit Court of Appeals indicates that that court entertains grave doubts as to whether section 1024 applies to the Territory, since the position taken by it in its opinion is that it cannot be said that the section in question does not apply to the Territory. That is to say, in discussing the case the court below has thrown upon petitioner the burden of showing conclusively that section 1024 does not apply to the Territory. We believe the rule to be that general statutes of procedure passed by Congress without specifically mentioning the Territories must be presumed to apply only to United States Circuit and District Courts, and not to territorial courts. It has been decided that the District Court for the District of Alaska is not a Circuit or District Court of the United States. In the case of *McAllister vs. United States*, 141 U. S., 174, the Supreme Court of the United States held (shortly after civil government was extended to Alaska) that the District Court for the District of Alaska was not a court of the United States. Following this decision, some ten years later, the Circuit Court of Appeals, Ninth Circuit, certified to the Supreme Court of the United States the case of *The Coquillam vs. United States*, 163 U. S., 346.

The question involved in that case was as to whether the District Court for the District of Alaska, when exercising its criminal admiralty jurisdiction, was a District Court of the United States within the meaning of the act allowing appeals to the Circuit Courts of Appeals. The Supreme Court of the United States held that it was not such a court, and in this connection used the following language (p. 351):

"The district and circuit courts mentioned in the act of 1891, and whose final judgments may be reviewed by the Circuit Courts of Appeals, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely, constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited, and the judges of which are entitled, by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. *American Ins. Co. v. Canter*, 1 Pet., 511, 546; *Benner v. Porter*, 9 How., 235, 242; *Clinton v. Englebrecht*, 13 Wall., 434, 447; *Hornbuckle v. Toombs*, 18 Wall., 648, 655; *Good v. Martin*, 95 U. S., 90, 98; *Reynolds v. United States*, 98 U. S., 145, 154; *The City of Panama*, 101 U. S., 453, 465. And it was adjudged in *McAllister v. United States*, 141 U. S., 174, 181, that the District Court established in Alaska, although invested with the civil and criminal jurisdiction of a District Court of the United States was a legislative court, created in virtue of the general right of sovereignty which exists in the government, or 'in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.' It was because the Alaska court was of the latter class that we held in *McAllister's* case that the judge of the District Court of that Territory could be suspended from office by the President under the authority conferred by section 1768 of the Revised Statutes.

"It necessarily results that the Circuit Court of

Appeals for the Ninth Circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the District and Circuit Courts mentioned in the Act of March 3, 1891."

An examination of the decisions of this court, as well as the decision of *Corbus vs. Leonhardt*, heretofore quoted, will show that general statutes of procedure found in the Revised Statutes of the United States are construed to apply only to United States Circuit and District Courts. This was the question discussed in the case of *Clinton vs. Englebrecht*, 13 Wall., 434, where the court said (p. 445):

"The regulations of that act (referring to the Judiciary Act of 1789) in regard to the selection of jurors have no reference whatever to the Territories. They were framed with reference to the States, and cannot, without violence to the rules of construction, be made to apply to the Territories of the United States. If, then, this subject was not regulated by Territorial law it would be difficult to say that the selection of jurors had been provided for at all in the Territories."

In the case of *Good vs. Martin*, 95 U. S., 90, 98, the Supreme Court of the United States said:

"Territorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities. *Clinton et al. v. Englebrecht*, 13 Wall., 434; *Hornbuckle v. Toombs*, 18 Wall., 648. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried; but the provision has no application in the courts of a Territory where a different rule prevails."

In the case of *Good vs. Martin*, *supra*, the Supreme Court held that a general statute of procedure, section 858 of the Revised Statutes of the United States, had no application to the procedure in the courts of the Territory. The Circuit Court of Appeals, Ninth Circuit, in the cases of *Corbus vs.*

Leonhardt, 114 Fed., 10, before quoted, held that section 858 of the Revised Statutes has no application to the Territory of Alaska.

We take the liberty of asking this court to compare section 1024 of the Revised Statutes which is under discussion in this case, with section 858 which was under discussion in the case of *Good vs. Martin*, *supra*, and the case of *Corbus vs. Leonhardt*, *supra*, and we take the further liberty of asking this court what if any distinction exists between section 1024 and section 858 which would give to section 1024 the force of a rule of procedure in the Territory while section 858 is excluded?

The case of *Thiede vs. Utah*, 159 U. S., 510, we submit is determinative of the rule of construction contended for by the petitioner in this case, namely, that general statutes of procedure found in the Revised Statutes of the United States primarily and presumptively apply to United States Circuit and District Courts only. How can the case of *Thiede vs. Utah*, 159 U. S., 510, be distinguished from the case at bar? In the *Thiede* case the court was dealing with the application of section 1033 of the Revised Statutes. Section 1033 does not refer to courts of the United States or to any other courts, but simply provides an apparently general rule of procedure in capital and treason cases. If anything, section 1033 is more general in its language than section 1024. In discussing the *Thiede* case the court said (pp. 514-515):

"By section 1033 Rev. Stat., the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and the list of the witnesses to be produced on the trial. *Logan v. United States*, 144 U. S., 263, 304. But this section applies to the Circuit and District courts of the United States, and does not control the practice and procedure of the courts of Utah, which are regulated by the statutes of that Territory. This question was fully considered in *Hornbuckle v. Toombs*, 18 Wall., 648, and it

was held, overruling prior decisions, that the pleadings and procedure of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. See also *Clinton v. Englebrecht*, 13 Wall., 434, in which it was held that the selection of jurors in territorial courts was to be made in conformity to the territorial statutes; *Good v. Martin*, 95 U. S., 90, in which a like ruling was made as to the competency of witnesses; *Reynolds v. United States*, 98 U. S., 145, where the same rule was applied to the impanelling of grand juries and the number of jurors; also *Miles v. United States*, 103 U. S., 304, a case coming from the Territory of Utah, in which the same doctrine was announced with regard to the mode of challenging petit jurors."

How can it be held consistently that section 1033 of the Revised Statutes has no application to the Territory and at the same time be held that its neighbor, but nine sections previous, to wit, section 1024, is a statute of procedure applicable to proceedings in territorial courts? The reason we say that section 1033 is more general in its scope than section 1024 is this: Section 1024 first became a law of the United States under a title and preamble that showed a specific intention to have it apply only to United States Circuit and District courts. (See act of February 26, 1853, 10 Stat. L., 161, 163.) The title of the act introducing section 1024 into the laws of the United States is as follows:

"An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the *Circuit and District courts of the United States*, and for other purposes." (Italics ours.)

The enacting clause of the act is as follows:

"Be it enacted, etc., that in lieu of compensation now allowed by law to attorneys, solicitors, and proctors in the *United States courts*, United States

district attorneys, clerks of the *district* and *circuit* courts, marshals, witnesses, jurors, commissioners, and printers in the *several States*, the following and no other compensation shall be taxed and allowed."

The act proceeds to provide a schedule of fees for United States attorneys, clerks, and marshals, and incorporated in the act is section 1024. The Circuit Court of Appeals has overlooked the fact that United States attorneys have always been compensated by salary in Alaska. The first organic act (23 Stat. L., 24), the act of May 17, 1884, provides as follows (p. 26):

"They shall receive respectively the following salaries. The governor the sum of three thousand dollars; the attorney the sum of two thousand five hundred dollars."

Subsequent acts of Congress have increased the salaries of these officials, but at no time have they been compensated except by salary.

After the passage of the act of February 26, 1853, in which we first find the language of section 1024 Rev. Stat., it was soon discovered that the act did not extend to the Territories. The provisions of the act in so far as they related to fees and compensation were extended to three Territories only, by the act of March 3, 1855. The Territories to which the act was extended were Minnesota, New Mexico, and Utah. (See 10 Stat. L., 671.) In this connection the following concession is made in the opinion of the Circuit Court of Appeals (Tr., 210):

"It is true that there were at that time other Territories of the United States than those which were specifically named."

This concession effectually disposes of the proposition that there was an intention to extend the act and all of its provisions generally to all the Territories. Subsequently on the 7th of August, 1882, Congress extended the fees provided

by the act of February 26, 1853, to the Territories of New Mexico and Arizona, New Mexico having in the meantime been subdivided. (See 22 Stat. L., 344, the language of which is as follows) :

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Congress of the United States entitled 'An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District courts of the United States, and for other purposes,' approved February 26th, eighteen hundred and fifty-three, and section eight hundred and thirty-seven of the Revised Statutes of the United States, is extended to the Territories of New Mexico and Arizona, and shall apply to the fees of all officers in such Territories; but the district attorney shall not, by fees and salary together, receive more than three thousand five hundred dollars per year, and all fees or moneys received by him above said amount shall be paid into the Treasury of the United States."

The above expression of the will of Congress showing that Congress held the act of February 26, 1853, not applicable to the Territories unless specifically extended thereto, we believe conclusively disposes of the proposition laid down by the Circuit Court of Appeals that section 1024, when it became a part of the Revised Statutes of the United States, became applicable to the Territory.

It must necessarily be assumed, therefore, that section 1024 was never intended by Congress to apply to the district of Alaska. The section prohibiting the charging of more than one crime in an indictment is common to all of the States and Territories of the Pacific slope. It was adopted in Montana prior to 1873 (see sections 184-188, Laws of Montana, 1871 to 1872); Arizona prior to 1872 (see section 217, Laws of Arizona, 1864 to 1871); California prior to 1853 (see Laws of California, 1850 to 1853, section 241); Nevada prior to 1874 (see section 1862, Compiled Laws of Nevada, vol. 1, 1861 to 1873); Utah, 1878 (see section 153, Laws of

Utah, 1878); Washington (see vol. 2, Hill's Code of Washington, p. 479, sec. 1230); Idaho prior to 1875 (see section 237, Laws of Idaho, 1874 to 1875).

It must be assumed that Congress was aware of the existence of these laws in the western Territories when it passed the Edmund's act in 1882 (22 Stat. L., 30). Without question it is there recognized that section 1024 of the Revised Statutes has no application to the Territories of the Pacific slope wherein polygamy was most prevalent and wherein also the local law prohibited the charging of more than one crime in an indictment. By section 4 of the Edmunds act Congress made special provision authorizing the joinder of separate offenses of polygamy and kindred social crimes in one indictment.

On the 4th of March, 1909, an act of Congress was approved which is known as the New Penal Code (35 Stat. L., 1088). That portion of the penal law of the United States which has particular and special application to Territories of the United States is codified and incorporated in the new penal act as chapter 13 and entitled "Certain offenses in the Territories." The first five sections of the chapter read as follows:

"SEC. 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States.

"SEC. 312. Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise publish or offer to publish in any manner, or shall otherwise have in his possession for any such purpose any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of

conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.

"SEC. 313. Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

"SEC. 314. If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.

"SEC. 315. *Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment.*"

It is apparent, therefore, that the laws of Congress applicable to the Territories at the present time permit the joinder in one indictment in territorial courts of counts relating to polygamy and cohabitation only, and that Congress has expressed its intention that in these specific instances only shall the local law of the Territory be abrogated.

Before passing from the discussion of this portion of the case we desire to call the attention of the court to the decision of the Circuit Court of Appeals, Ninth Circuit, in the case of *Ball vs. The United States*, 147 Fed., 32, which holds that section 1033 of the Revised Statutes of the United States has no application to the District of Alaska and does not control the practice and procedure in the territorial court. If 1033 has no application to the District of Alaska under the ruling of the Circuit Court of Appeals, how can 1024 be held to apply?

All through the statutes of the United States from a very early day the following custom is apparent with reference to legislation, to wit, whenever a statute of procedure is passed it presumably affects only procedure in the United States Circuit and District Courts, and whenever Congress desires to give to it a broader application it expresses a deliberate intention to have the statute of procedure apply also to the Territories. There is no better example of such custom than the act of July 22, 1913, which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever there shall be several actions or processes against persons who might legally be joined in one action or process, touching any demand or matter in dispute before a court of the United States or of the Territories thereof, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action or process, unless special cause for several actions or processes shall be satisfactorily shown on motion in open court.

"Sec. 2. Be it further enacted, That whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one libel before a court of the United States or of the Territories thereof, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid. And in pro-

ceedings on several libels or informations against any cargo or parts of cargo or merchandise seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned; but allowance may be made on one libel or information for the costs incidental to several claims: *Provided*, That in case of a claim of any vessel or other property seized on behalf of the United States and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same upon paying only his own costs.

"SEC. 3. *And be it further enacted*, That whenever causes of like nature or relative to the same question shall be pending before a court of the United States *or of the Territories thereof*, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States *or of the Territories thereof*, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

"Approved, July 22, 1913."

An examination of the Revised Statutes of the United States will show numerous other sections in which Congress has been careful to apply certain methods of procedure by specific enactment, to the Territories. In such cases the word "Territory" or "territorial" is always found in the statute. (See sections 184, 362, 370, 567, 568, 569, 699, 702, 703, 704, 713, 748, 811, 823, 849, 868, 869, 871, 982, 1025, 1883, 1982, 1986, 2165, 2203, 5237, 5239, 5270, Rev. Stat.; see also Bankruptcy Act, Rev. Stat., Supp. V. 2, p. 843.)

The question of procedure involved in this case upon the demurrer to the indictment has been discussed before the constitutional question involved in the case because we feel that the ruling of the lower court is so clearly in violation of the general system of statutory construction under the settled rule of this court with reference to all of the Territories, including Alaska, that the case should be reversed upon the question of procedure. In that event it will not be necessary to pass upon the constitutional questions involved herein.

It is hardly necessary to call the court's attention to the fact that is conceded by the Attorney General's motion to advance, that if the Government is in error in this case, there is time left in which to reindict petitioner if the Government's case be meritorious. The tendency of the courts has been to disparage the raising of questions of procedure where the same will result in such delay that the Government is deprived of its criminal remedy. For this reason we desire to call the court's attention to the fact that petitioner appealed to the Circuit Court of Appeals on the same day that judgment was rendered against him and filed his petition for a writ of certiorari in this court even before his petition for rehearing was disposed of in the Circuit Court of Appeals. A reversal of this case, it is conceded, will not defeat the ends of justice.

II.

The court erred in entering judgment against and sentencing the petitioner, since it is not within the power of a judge in a criminal case, in the absence of a plea of guilty, to make a finding of fact as to the guilt of a defendant unless a finding of fact to the same effect has been made previously by a jury of twelve men pursuant to the Constitution of the United States.

Upon this question the following appears to be the state of the law in the Supreme Court of the United States:

In the case of *Callan vs. Wilson*, 127 U. S., 540, the defendant was charged with the crime of conspiracy in the police court of the District of Columbia, convicted by the judgment of that court without a jury, and fined \$25. The defendant appealed his case and then defaulted in the payment of his fine and withdrew the appeal, went to jail and sued out a writ of *habeas corpus* against the United States marshal for the District of Columbia. It was held that the offense with which he was charged was a crime and that the judgment of the lower court was void, not having been supported by the verdict of a jury. The court accordingly ordered the discharge of the petitioner from custody.

One of the most recent cases on the question of the right to jury trial is the case of *Schick vs. United States*, 195 U. S., 65. In the opinion of the court, at page 70, the following language of the opinion in *Callan vs. Wilson* is quoted with approval:

"Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by, or under the authority of, the United States, secures to

him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged."

In the case of *Schick vs. United States*, above cited, the court held that, in a prosecution under section 11 of the oleomargarine act, which reads as follows: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of \$50 for each such offense," the defendant was really not charged with a crime, but with a petty offense; therefore, under the ruling in the case of *Callan vs. Wilson, supra*, a jury might be waived. Mr. Justice Brewer in his opinion further discusses the provisions of the Constitution in regard to the right to jury trial as reported to the convention, which were as follows:

"The trial of all criminal offenses shall be by jury,"

and shows that by unanimous vote the draft of the Constitution was amended so as to read "The trial of all crimes." Under the peculiar circumstances of that case, which simply involved the payment of a fine of \$50, it was held that the defendants were charged with a petty offense only, and might waive a trial by jury.

It will be seen also that the question involved herein is one that this court will require to be discussed. We quote from the *Schick* case (p. 67):

"In each case the parties in writing waived a jury, and agreed to submit the issues to the court. * * * The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect was suggested by this court and briefs called for from the respective parties."

It is unnecessary to discuss at length the case of *Rasmussen vs. United States*, 197 U. S., 516. It is sufficient

to say that in that case the act of Congress providing a criminal code for Alaska was declared unconstitutional in so far as it reduced the number of jurors required for the trial of a misdemeanor from twelve to six.

The decision in the case of *Thompson vs. Utah*, 170 U. S., 343, is determinative of the question involved in this case. While we ask an examination of all these authorities, we take the liberty of quoting the following language from that opinion (p. 353):

"It is said that the accused did not object until after verdict to a trial jury composed of eight persons, therefore, he should not be heard to say that his trial by a such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt."

We especially ask the court to read in this connection also the case of *Cancemi vs. People*, 18 N. Y., 131. In that case one of the twelve jurors was withdrawn upon the express consent and stipulation of the prisoner, who was tried by the eleven remaining jurors. The court said:

"If the deficiency of one juror may be waived there appears to be no good reason why a deficiency of eleven might not be and it is difficult to see why the entire panel might not be dispensed with and the trial committed to the court alone."

In discussing the early English cases the court used the following language:

"The opinion of the judges in the Court of the King's Bench in the case of Lord Dacres, tried in the reign of Henry VIII for treason, strongly fortified the conclusion above expressed. One question in the case was whether a prisoner might waive a trial by his peers and be tried by the country, and the judges agreed that he could not, for the statute of Magna

Charta was in the negative and prosecution was at the King's suit. Woodeson, in his lectures (vol. 1, p. 346), says the same question was resolved on the arraignment of Lord Sudley in the seventh year of the reign of Charles I, and that the reason was that the mode of trial was not so broadly a privilege of the nobility as a part of the law of the land, like the trial of commoners by commoners enacted or rather declared by Magna Charta. In 3 Inst., 30, the doctrine is stated that 'a nobleman cannot waive his trial by his peers and put himself upon the trial of the country, that is, of twelve freeholders; for the statute of Magna Charta is that he must be tried *per pares*,' and so it was resolved in Lord Dacres' case."

A lengthy brief citing the cases in which the question now being discussed is involved is unnecessary, for the reason that the matter is thoroughly digested in a most exhaustive foot note to the case of *Re McQuown*, found in the 11th L. R. A., new series, at page 1136. The following is the statement of the digester:

"Although the contrary has been asserted many times, yet, when confined to cases involving the waiver by one charged with a crime, of a trial by jury, as distinguished from other questions, such as consenting to trial by a less number of jurymen than provided for by the Constitution, or waiver of the disqualification of certain jurors and the like, *the proposition may be safely asserted that the courts are unanimous in holding that, as to felonies, in the absence of statutory authority, a defendant cannot waive a jury trial, and an attempt so to do, followed by a trial before the court without a jury, will be of no avail, and a judgment rendered by the court will be erroneous if not void.*"

In the note above quoted are collected all of the cases bearing upon the subject. The decision of the Circuit Court of Appeals for the First Circuit in the case of *Keliber vs. United States*, 193 Fed., 8, settles beyond question the proposition that a violation of the National Banking Act, with

which defendant in this case is charged, is a felony since the passage of the penal code act of March, 1909 (35 Stat. L., 1088).

We respectfully submit that since the question involved in this case must arise now or later upon *habeas corpus*, as in *Callan vs. Wilson*, the questions involved herein should be disposed of by this court expeditiously upon this writ of certiorari.

The writ of certiorari in the case at bar was granted on the 28th of April, 1913. On the 5th of May, 1913, an opinion was rendered by the Circuit Court of Appeals for the Ninth Circuit upon a petition for rehearing (Tr., pp. 220-221), in which the Circuit Court of Appeals discussed for the first time the question of the right of jury trial, and a few comments upon the same are necessary in addition to the authorities heretofore cited. The statement is made by the Circuit Court of Appeals that there was no assignment to direct the attention of that court to the alleged error. The third specification of error in the brief of the plaintiff in error in the Circuit Court of Appeals, copies of which are on file herein (see page 6 of said brief), recites that the court erred in rendering and entering judgment against the defendant upon the record herein, and the third specification of error is argued on pages 76 and 77 of the brief of the plaintiff in error in the Circuit Court of Appeals. It was clearly stated in that argument that the plaintiff in error claimed the protection of the Constitution of the United States. The case of *Rasmussen vs. United States*, 197 U. S., 516, which holds that the constitutional right of jury trial applies to the Territory of Alaska, is cited at page 76 of that brief. The case of *Thompson vs. Utah*, 170 U. S., 343, which holds that the right to a jury trial cannot be waived, is cited at page 76 of that brief.

A discussion of the third specification of error is at the end of the brief of plaintiff in error in the Circuit Court of Appeals. It may be that the argument in support of this

assignment of error was not noticed by the Circuit Court of Appeals on the original hearing, but through no fault of the petitioner, as the question is plainly raised and the two leading authorities on the subject are distinctly cited.

The court proceeds then to hold that section 97 of the Alaska Code of Criminal Procedure applies to the proceedings in this case and bars the defendant from raising the question that he was not tried by a jury. The court further says, "There is no question here of a waiver of a jury trial." The record in the case before the Circuit Court of Appeals shows the contrary. (See Tr., p. 181, which reads as follows):

"* * * and the court being fully advised in the premises rules that the Federal procedure prevails in all proceedings in this cause; but that the defendant C. M. Summers may waive trial by jury if he so elects and have judgment entered against him pursuant to the provisions of section 97, part II, of the Alaska Penal Code."

Furthermore, in the opinion of the trial court, which was before the Circuit Court of Appeals as an exhibit to the Government's brief, the following language is to be found:

"In the case of the United States *vs.* Summers, while I am satisfied as held yesterday, that the Federal practice prevails in Alaska, yet I am also satisfied that the practice can be waived so long as it is invited by the defendant himself."

After these remarks and the recital in the journal before mentioned, the court proceeded to and did pronounce judgment against the defendant (Tr., pp. 182-185).

It was distinctly held by the trial court, therefore, that the Federal practice prevailed and that section 97 did not prevail as a matter of law in the trial of the petitioner, but the election of the petitioner to stand upon section 97 was construed by the court to be a waiver of a trial by jury and the court proceeded thereafter to find the defendant guilty

upon each of the counts in the indictment, which finding of fact was not supported by the finding of the only tribunal, a legally constituted jury, that could determine that fact in the absence of a plea of guilty.

If the demurrer of the petitioner in this case is to be finally overruled herein it can only be overruled upon the ground that the local practice does not prevail in a proceeding wherein the Government attempts to punish for violation of its general statutes as distinguished from its local territorial statutes. It follows, therefore, that the Circuit Court of Appeals cannot sustain its position both as to the demurrer and the judgment, for if the demurrer is sustained, it is upon the ground that the local practice does not prevail, and the judgment as sustained by the Circuit Court of Appeals is upon the ground that there was no waiver, but that the judgment was supported by the local practice. If the demurrer be overruled, under section 1024, then the judgment is void by virtue of the force of section 1026, Rev. Stat., which provides as follows:

"In every case in any court of the United States where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondent ouster*; and thereupon a trial may be ordered at the same term or a continuance may be ordered, as justice may require."

Section 1032, Rev. Stat., provides:

"When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further ceremony, be tried by a jury."

The position of petitioner herein that the indictment was demurrable under the local law and that judgment could be entered against the defendant under the provisions of the local law are entirely consistent. The position of the Circuit Court of Appeals that the demurrer should be overruled on the ground that the local law is not applicable, but that the judgment shall be sustained under the provisions of the local law, is, we submit, necessarily inconsistent.

The construction placed by the lower court upon the acts of the defendant to the effect that he had waived his right to jury trial necessarily raises the question in this court. Can a defendant in a criminal case, by waiver, transfer jurisdiction from a jury to a judge to make the finding of fact as to his innocence or guilt?

We respectfully submit that the judgment of the lower court should be reversed.

ALBERT FINK,
LEWIS P. SHACKLEFORD,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
KURNAL R. BABBITT,

Attorneys for Petitioner.

APPENDIX A.

Oral Opinion of Trial Court, Case at Bar.

TEN O'CLOCK A. M., MONDAY, *May 20, 1912.*

THE COURT (LYONS, J.): I have given the matter considerable consideration, gentlemen, and gave it extended consideration at the time of an analogous question in the case of the Transportation cases—in the case of the United States *versus* The Pacific and Arctic Railway and Navigation Company, and others. In that case the demurrer was interposed to the indictment and alleged, among other things, that the indictment joined more than one count and for that reason was not in accordance with the provisions of the local code. The court held that the prosecution being for an infraction of the laws of the United States, general laws of the United States, or one of them, the procedure provided for in the local code did not apply and overruled the demurrer for that reason.

The question is now raised as to whether or not after proceeding beyond the indictment whether or not the Federal procedure still obtains or the local code governs. It is true, as argued by counsel for the defendant, that the court based its ruling largely in the Transportation cases on the construction of three sections of the criminal code, to wit: 1, 10, and 13; which seemed to the court to negative the idea that only one system of practice obtains in Alaska, and that section 10 in the nature of things must contemplate two procedures, for it says that grand juries shall be selected and summoned and their proceedings shall be in accordance with the laws of the United States. If the letter of that statute is followed, it renders nugatory the entire local code governing the trial of local cases; so the court held that what the statute must mean was that when prosecuting cases for

infractions of the general laws that the law means that grand juries shall be selected and summoned and their proceedings shall be governed by the general laws of the United States, but when the grand jury is operating within the jurisdiction of a territorial organization purely, then the grand jury is summoned and selected according to the laws of the United States, the general laws of the United States, but their procedure is governed by the local code.

Proceeding, now, and assuming that the court was right in so holding, and I will say, gentlemen, that the more I consider the question—while I realize it is not entirely free from difficulty—the more I reflect on the matter, the more I am convinced that that is the only theory upon which to proceed to give all the laws which apply to Alaska a reasonable construction. Section 1891 of the Revised Statutes of the United States provides the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory wherever organized as elsewhere within the United States. There has been some controversy in the past whether or not that section applied to the District of Alaska, but that has been settled by the Nagle case that Alaska is an organized Territory within the meaning of that statute, and that all of the laws of the United States and the Constitution, unless the laws are locally inapplicable, are the laws of the District of Alaska the same as they are in every part of the United States. That being true, what position are we in? We read, then, in conjunction with that the opening section of the Code of Criminal Procedure, which provides as follows:

“That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided.”

We find in Title I that it refers to the Criminal Code of the District of Alaska. Under the maxim that the expression of one means the exclusion of others, the natural and

inevitable construction placed upon that, the opening section, is that the Code of Criminal Procedure applies to the crimes defined in Title I, which are laws peculiarly local in their nature and only refer to the District of Alaska and to no other part of the United States. Now, proceeding, then, and it seems to me that is a fair and reasonable construction of that section, taking that in conjunction with the section of the United States statutes just read, section 1891, and what have we? We have section 1891 transferring all the laws of the United States to the District of Alaska not locally inapplicable. Now, why say that transfers the substantive law but not the law of procedure? It would seem that if Congress conceived the idea it was necessary to transfer the substantive law, that unless its will were declared in specific terms to the contrary that the law of procedure should also follow. Now, what is there about the Federal practice which cannot be considered applicable in the District of Alaska? The peculiar character of the crime charged? The same is true of the Transportation case, which has been deemed wise to allow the joinder of more than one count. If that is true in the State of Washington, why shouldn't it be true in the District of Alaska? Of course, I don't mean to say that if there is anything in the acts of Congress that indicate the contrary that this court has any right, or any other court has any right, to say that because it looks reasonable it must be so, but if it looks reasonable and if it is in consonance with the reasonable construction of our own statute, and if there is nothing in any of the acts of Congress which declare to the contrary, then why should Congress say we will give you the substantive law, but we will withhold the ordinary machinery which is followed in the trial of an infraction of such law?

Now, let us see if there is anything in conflict with that in the cases that counsel cites. In the Coquitlam case the only question involved was whether or not an appeal would lie from this District Court to the Circuit Court of Appeals, the Circuit Court of Appeals having been constructed by

the act of 1891. It was conceived that because the words "District and Circuit Courts of the United States" were used and only referred to constitutional courts, this not being a constitutional court, therefore no appeal would lie from it. The Supreme Court of the United States held that it was a Supreme Court of the Territory, the highest court in the Territory, and for that reason under other provisions of the same act an appeal would lie to the Circuit Court of Appeals for the Ninth Circuit. In the McAllister case, counsel is right when he contends that the question was as to whether or not the President of the United States could remove or suspend a judge of this court, and the majority of the court held that he could, and held that the act under which he dismissed Judge McAllister and which act excepted from the power of the President to so dismiss courts of the United States, Justice Harlan, in writing the opinion of the majority of the court, held that this was not a court of the United States under the third article of the Constitution, which provides that the judicial power of the United States shall be reposed in a Supreme Court and as many inferior courts as Congress may from time to time organize and create, but that this was a court created by Congress under the general provisions of the Constitution, which provide that Congress has complete control over the Territories and may legislate for them as it sees fit.

Is there anything incompatible with saying that this is not a court of the United States in the constitutional sense and the ruling of the court on this occasion? I think not, Mr. Shackelford. I concur with you when you say it isn't a court of the United States in a constitutional sense. I will go further and agree with you that when the acts of Congress mention courts of the United States, they don't mean this court, because this is a territorial court pure and simple, but it exercises the jurisdiction of courts of the United States and when it exercises the jurisdiction of courts of the United States, and when Congress says that all laws not locally inapplicable are transferred to the District of Alaska,

then it seems to me that it is a perfectly natural construction to give it, although it is not a court of the United States. Yet, when it is sitting and exercising that jurisdiction to enforce the laws of the United States, unless there is some negating act of Congress withdrawing from it the right to use the procedure which the Federal courts use, under that section of the act of Congress, it is a natural and reasonable construction to give it that not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law, applies, and unless I am wrong in the ruling in the Transportation case, I am satisfied that the court is right now, because one couldn't be correct, in my judgment, and the other incorrect, because if a portion of the procedure is applicable, the whole of it is applicable. Therefore, it seems to me that the only procedure that can be followed in this case is the Federal procedure, and that deprives the court of the power to enter a judgment in a criminal case against any man without a trial.

TEN O'CLOCK A. M., TUESDAY, *May* 21, 1912.

COURT: In the case of the United States against Summers, while I am satisfied, as held yesterday, that the Federal practice prevails in Alaska, yet I am also satisfied that practice can be waived so long as it is invited by the defendant himself. However, I wasn't giving this matter any consideration yesterday. The only question before the court for consideration was whether or not the Federal practice or the local practice obtained, and I am satisfied that the Federal practice obtains; that is, I say it is a matter of procedure, and I am satisfied that the defendant can waive any procedure under the Diaz case and elect to stand on the local practice. Now, at this time, I understand the defendant still asks to be sentenced without proceeding further with the trial.

SUBJECT INDEX.

	Page
Statement.....	1
Argument.....	2
I. Did the local Territorial, as distinguished from the procedure adopted for United States district and circuit courts, prevail?.....	3
a. The law prior to the act of March 3, 1899.....	3
b. The operative effect of the act of March 3, 1899.....	12
c. The error, if any, in the reasoning of the lower courts..	17
d. The cases and reasoning relied upon by respondent....	21
II. Is the indictment validated by reason of the act of the Territorial Legislature changing the law while the case was pending on appeal?.....	25
III. The constitutional question involved.....	30
a. The record..	30
b. The decision of the lower courts.....	31
c. The error in the decision of the lower courts and contention of respondent.....	32
d. Cases relied upon by respondent....	34
e. A jury cannot be waived.....	39
f. The record shows a waiver in effect.....	41
g. The consequences of affirmation of judgment in this case.....	42
Conclusion.....	44

INDEX OF CASES CITED.

Ball <i>vs.</i> U. S., 147 Fed., 32.....	12
Binns <i>vs.</i> U. S., 194 U. S., 486.....	4
Callan <i>vs.</i> Wilson, 127 U. S., 540.....	34
Cansamie <i>vs.</i> People, 18 N. Y., 128.....	40
Clinton <i>vs.</i> Englebrecht, 13 Wall., 434.....	7
Cochran <i>vs.</i> U. S., 147 Fed., 205.....	10
The Coquitlam <i>vs.</i> U. S., 178 U. S., 346.....	4
Corbus <i>vs.</i> Leonhardt, 114 Fed., 10.....	12
Crane <i>vs.</i> U. S., 162 U. S., 625.....	43
Diaz <i>vs.</i> U. S., 223 U. S., 442.....	40

	Page
Endleman <i>vs.</i> U. S., 86 Fed., 473.....	11
Fitzpatrick <i>vs.</i> U. S., 178 U. S., 306.....	9
Good <i>vs.</i> Martin, 95 U. S., 90.....	6
Hallinger <i>vs.</i> Davis, 146 U. S., 319.....	37
Hill <i>vs.</i> People, 10 Mich., 351.....	12
Hornbuckle <i>vs.</i> Toombs, 18 Wall., 648.....	5
Hyde <i>vs.</i> Shine, 190 U. S., 62.....	23
Hirn <i>vs.</i> State, 1 O. St., 16.....	39
Interstate Commerce Commission <i>vs.</i> U. S., 224 U. S., 474.....	4
Jackson <i>vs.</i> U. S., 102 Fed., 473.....	11
Keys <i>vs.</i> U. S., 27 Fed., 351.....	24
Kring <i>vs.</i> U. S., 107 U. S., 221.....	27
Miles <i>vs.</i> U. S., 103 U. S., 305.....	8
Page <i>vs.</i> Burnstine, 102 U. S., 664.....	8
People <i>vs.</i> King, 28 Cal., 271.....	38
Powers <i>vs.</i> U. S., 223 U. S., 303.....	39
Queenan <i>vs.</i> Oklahoma, 190 U. S., 458.....	39
Rasmussen <i>vs.</i> U. S., 197 U. S., 516.....	4
Reynolds <i>vs.</i> U. S., 98 U. S., 145.....	7
Rodriguez <i>vs.</i> U. S., 198 U. S., 156.....	39
Ross <i>vs.</i> State, 9 Mo., 686.....	39
Schick <i>vs.</i> U. S., 195 U. S., 65.....	37
State <i>vs.</i> Carman, 63 Iowa, 130.....	36
State <i>vs.</i> Mansfield, 41 Mo., 470.....	41
Theide <i>vs.</i> Utah, 159 U. S., 515.....	9
Thomas <i>vs.</i> State, 6 Mo., 457.....	39
Thompson <i>vs.</i> Utah, 170 U. S., 351.....	29
Tucker <i>vs.</i> U. S., 196 Fed., 261.....	38
U. S. <i>vs.</i> Lair, 195 Fed., 49.....	38
U. S. <i>vs.</i> Pacific & Arctic Co., 228 U. S., 87.....	23
U. S. <i>vs.</i> Quinn, 8 Blatch., 48.....	37

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

(All italics ours.)

Statement.

Defendant was indicted in the Territory of Alaska under Sec. 5209, Revised Statutes, providing a penalty for violation of the National Banking Laws. The indictment contained 56 counts.

The indictment was demurred to, for that it charged more than one crime. The demurrer was overruled.

An Alaskan statute passed by Congress for the Territory, March 3, 1899, provides:

"That if the demurrer be disallowed the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

Defendant elected to stand on his demurrer, and was forthwith found guilty by the court, without a trial or the intervention of a jury, on each of the 56 counts, and thereupon sentenced to serve a term of five years in the Federal penitentiary at McNeil's Island, on each count, the time to run concurrently and the entire sentence to be completed upon the service of five years.

This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit on writ of error, and this court granted certiorari.

ARGUMENT.

Three points are involved:

I. *When a territorial court is exercising the jurisdiction of a district court of the United States, does the local procedure of the Territory or that prescribed by the Revised Statutes for circuit and district courts of the United States apply?*

II. *Will an indictment invalid on demurrer, for that it charges more than one crime, become valid through a change in the statute law made subsequent to the filing of the demurrer?*

III. *Is an act of Congress passed for the Territory of Alaska, under the terms of which a defendant in a criminal case, after demurrer overruled, may waive both jury and trial and receive sentence without a plea of guilty, valid?*

I.

An examination of the first point involves the consideration of:

- a. The law prior to the act of March 3, 1899.
- b. The operative effect of the act of March 3, 1899.
- c. The error, if any, in the reasoning of the lower courts.
- d. The cases and reasoning relied upon by respondent.

a.

The Law as it Stood Prior to the Act of 1899, Providing a Code of Criminal Procedure for the Territory.

By the act of May 17, 1884, 23 Stats., 24, providing a civil government for Alaska, it was, among other things, provided:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said District, so far as the same may be applicable, and not in conflict with the provisions of this act or the laws of the United States."

At that time an act of Oregon, approved October 19, 1864, provided:

"That the indictment must charge but one crime and in one form only."

At the same time (1884), section 1024 of the Revised Statutes provided:

"SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated."

Thus stood the statute law upon the subject prior to the act of March 3, 1899.

As to the law prior to *March 3, 1899*, there can be no controversy. The rule has been so frequently announced by this court as to admit of no argument.

Alaska was and is an organized Territory.

The Coquitlam v. U. S., 178 U. S., 346.

Biss vs. U. S., 194 U. S., 486.

Rasmussen vs. United States, 197 U. S., 516.

Interstate Commerce Commission vs. U. S., 224 U. S., 474.

In the territories the local procedure obtains; not that provided for in general laws of the United States for district and circuit courts.

This question first arose in 1871 in

Clinton vs. Englebrecht, 13 Wall., 434.

A petit jury was impaneled as provided by the laws of the United States, and not in accordance with the law of the Territory of Utah. The same argument was then pressed upon the court as is now advanced by the Government, *i. e.*, the enabling act of Utah, providing,—

“That the Constitution *and laws* of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable,”—

and the district court of the Territory being clothed with the same jurisdiction as the district court of Alaska, that is, with not only local territorial jurisdiction, but also that of district and circuit courts of the United States, it was insisted that the local law with reference to the impaneling of juries being in conflict with the general law of the United States, the former must yield and the latter prevail, but this court said:

"Acting upon the theory that the supreme and district courts of the Territory were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, the district court summoned the jury in this case by open venire, *we are of opinion that the court erred in its theory and in its action.*

"The judges of the Supreme Court of the Territory are appointed by the President under an act of Congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in the American Insurance Company *vs.* Canter, and in the later case of Benner *vs.* Porter."

A similar question next arose in 1873 in
Hornbuckle vs. Toombs, 18 Wall., 648.

A statute of the United States, commonly known as the process act of 1792, 1 Stat., 276, provided for the separation of legal and equitable causes of action in the courts of the United States, a statute of the Territory of Montana for their commingling. The organic act clothed the territorial courts with the jurisdiction of circuit and district courts of the United States, and prohibited the passage of any laws in conflict with the Constitution *and laws* of the United States. The same argument advanced in the Clinton case, *supra*, and reiterated here, was again urged, but the court said, p. 654:

"A clause in the thirteenth section of the act, however, has been referred to, by which it is declared 'That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere in the United States;' and it is argued that by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of Congress, *are imported into the practice of the territorial courts.* But this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific

application, and are, in truth and in fact, *locally inapplicable to the courts of a Territory.*

"The acts of Congress respecting proceedings in the United States courts are concerned with, and *confined to*, those courts considered as parts of the Federal system and as invested with the judicial the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

"As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter, and revoke at its discretion." * * *

"From a review of the entire past legislation of Congress on the subject under consideration our conclusion is, that the *practice, pleadings, and forms and modes of proceeding* of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves."

The point next arose in 1877 in
Good vs. Martin, 95 U. S., 90.

A general law of the United States, 13 Stats., 351, provided that no person should be excluded from testifying in

a court of the United States because of interest. A territorial law of Colorado provided the contrary. The question was, Which should prevail? The court said:

Territorial courts are not courts of the United States, within the meaning of the Constitution, as appears by all the authorities. *Clinton et al. vs. Englebrecht*, 13 Wall., 434; *Hornbuckle vs. Toombs*, 18 Wall., 648. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried, but the provision *has no application in the courts of a Territory* where a different rule prevails.

The point next arose in 1878 in
Reynolds vs. U. S., 98 U. S., 145.

This was a prosecution for bigamy under R. S., 5352. The court, as in the case at bar, was exercising the jurisdiction of a *district court of the United States*. The question was as to the mode of impaneling the grand jury, whether under R. S., 808, or according to the territorial law. The court said:

"Sec. 808, Revised Statutes, requires that a grand jury impaneled before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the Territory limits the number in the district courts of the Territory to fifteen. Comp. Laws, Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is, *whether the section of the Revised Statutes referred to or the statutes of the Territory governs the case.*

"By sec. 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States; *but this does not make them circuit and district courts of the United States.*

"Sec. 808 was not designed to regulate the impaneling of grand juries in all courts where offenders against the laws of the United States could be tried,

but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. *Clinton vs. Englebrecht, supra; Hornbuckle vs. Toombs*, 18 Wall., 648."

The question twice arose in 1880, first in *Page vs. Burnstine*, 102 U. S., 664.

Here the question was as to the applicability to the District of Columbia of R. S., 858, prohibiting any testimony in suits by or against an executor, by either of the parties thereto, as to transactions with or statements of the decedent. The section was held applicable, not because of any conflict between the laws of the United States and those of the District of Columbia, but, on the contrary, because it was found from the history of the section itself that it was the *intention of Congress that it apply to the District*.

That it was not intended to modify the rule theretofore announced is most apparent. The court said:

"These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was therefore ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to 'courts of the United States.' *Clinton vs. Englebrecht*, 13 Wall., 434; *Hornbuckle vs. Toombs*, 18 *Id.*, 646; *Good vs. Martin*, 95 U. S., 90."

And secondly in *Miles vs. U. S.*, 103 U. S., 305.

This, like the Reynolds case, was a prosecution under R. S., 5352, for bigamy. The territorial court, as in the case at bar, was exercising the *jurisdiction of a district court of the United States*. The question presented was as to the manner of trying a juror on a challenge for actual bias. The court said:

"In impaneling the jury the court was bound to follow *the law of the Territory* on that subject. *Clinton vs. Englebrecht*, 13 Wall., 434; *Reynolds vs. United States*, 98 U. S., 145."

The point next arose in 1885 in
Theide vs. Utah, 159 U. S., 515.

This was a prosecution for murder. R. S., 1033, provided that the defendant in a capital case was entitled to have delivered to him at least two days before the trial a copy of the indictment and a list of the witnesses to be produced at the trial. The question presented was whether this section was applicable. The court said:

"But this section applies to the circuit and district courts of the United States, and does not control the practice and procedure of the courts of Utah, *which are regulated by the statutes of that Territory*."

Finally, the precise question came to this court in 1899 from the *Territory of Alaska*, in
Fitzpatrick vs. U. S., 178 U. S., 306.

That was a prosecution under a *general law of the United States*, R. S., 5339. The trial court was exercising the jurisdiction of a *district court of the United States*, as distinguished from that of a territorial court. The question presented was as to the *sufficiency of the indictment*.

By what law was it construed?

The court said:

"By section seven of an act providing a civil government for Alaska, approved May 17, 1884, c. 53,

23 Stat., 24, it is enacted 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' *We are, therefore, to look to the law of Oregon and the interpretation put thereon by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law.'*

The whole learning upon the subject was reviewed as late as 1906 by *Mr. Justice Van Devanter*, then circuit judge, speaking for the Circuit Court of Appeals for the Eighth Circuit in

Cochran vs. U. S., 147 Fed., 206.

That was a prosecution under R. S. 2145, and the trial court "*was exercising the jurisdiction of the circuit and district courts of the United States.*" The question arose on the right of the defendants to separate trials and the number of peremptory challenges to which they were entitled. Should the Revised Statutes of the United States or the Territorial law apply? The court said:

"It is important, therefore, to inquire whether the territorial district court, *when exercising the jurisdiction of the circuit and district courts of the United States in the trial of an offense against the laws of the United States*, should conform to the practice and modes of proceeding in the circuit and district courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated decisions of the Supreme Court of the United States. *Reynolds vs. United States*, 98 U. S., 145, 154; 25 L. Ed., 244; *Miles vs. United States*, 103 U. S., 304, 310; 26 L. Ed., 659; *Hornbuckle vs. Toombs*, 18 Wall., 648; 21 L. Ed., 966; *Good vs. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341.

"These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction

in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, are not courts of the United States, but legislative courts of the territories; *that the practice and modes of proceeding including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specially provided by some law of the United States.*"

The precise point now presented has been four times decided adversely to the contention of the Government by the Circuit Court of Appeals for the Ninth Circuit. In

Endleman vs. U. S. (1898), 86 Fed., 456,

a prosecution for the illegal sale of liquors, there was a demurrer to the indictment for that it charged *more than one crime*, and the question was determined *by the law of Oregon*. In

Jackson vs. U. S. (1900), 102 Fed., 473,

there was a prosecution for assault with a dangerous weapon. There were a number of objections to the indictment. Its sufficiency was in each respect determined by *the law of Oregon*. There was an objection to a grand juror for actual bias. Its validity was decided by the *law of Oregon*. The court said:

"We are of the opinion that this action of the court was not erroneous. The procedure relative to summoning and impaneling grand jurors is often expressly provided for by statute. In such cases the courts substantially conform to such procedure. In *Reynolds vs. U. S.*, 98 U. S., 145, the court held that section 808 R. S., provided for impaneling grand juries, applies only to the circuit and district courts of the United States and that the laws of the territory govern and control the impaneling of a grand jury."

In 1902 the same question arose in
Corbus vs. Leonhardt, 114 Fed., 10.

holding that R. S. 858, providing that in actions by or against executors, etc., no party shall be allowed to testify against the other, etc., had no application to territorial courts.

Finally, in 1906, the point arose in
Ball vs. U. S., 147 Fed., 32.

Here it was held that in a prosecution for murder, the requirements of R. S. 1033 as to furnishing the accused with a list of witnesses had no application to the Territory of Alaska.

Such, then, was the law prior to the act of March 3, 1899, providing a code of criminal procedure, for the District of Alaska.

b.

The Operative Effect of the Act of March 3, 1899.

The question now is: Did Congress, by the legislation of 1899, intend to repeal the law with reference to the charging of more than one crime in an indictment, as it had theretofore stood since 1884, substituting in lieu thereof the practice provided for in R. S. 1024?

No such intention can be found in the act itself.

The title of that act, 30 Stat., is:

"An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district."

The enacting clause is:

"That the penal and criminal laws of the United States and the procedure thereunder relating to the District of Alaska shall be as follows:"

It will be observed that no differentiation is made between the procedure in case of the infraction of laws peculiar to the Territory itself, and that to obtain under a general law applicable to Alaska, as well as other portions of the United States.

The meaning is that the procedure is to be the same in both events.

"The penal and criminal laws of the United States of America," *not the penal and criminal laws of the United States of America applicable only to Alaska*, and the "procedure thereunder relating to the District of Alaska shall be as follows."

That is to say, that the procedure under all penal and criminal laws of the United States of America, *whether they be local or general*, if only they apply to Alaska, shall be as set forth.

How can it be said that there is here expressed any intention to adopt a dual system of procedure—in the one case that prescribed in the act itself, and in the other that provided for in the Revised Statutes.

The act is in two titles. Title I defines certain crimes against the Territory. Title II provides the procedure.

Section 1 of title II provides,

"That proceedings for the punishment and prevention of the crimes defined in title I of this act shall be conducted in the manner herein provided."

Section 43, title II, provides,

"That the indictment must charge but one crime, and in one form only, except that where the crime may be committed by the use of different means, the indictment may allege the means in the alternative."

Where is there here manifest any intention to adopt a dual system of procedure?

If it be true, as contended, that the apparent limitation contained in Sec. 1 of title II is such as to make Sec. 43 applicable only to the crimes defined in title I, does it *necessarily follow* that this indicates an intention to make some other procedure applicable to crimes not defined in title I?

Is it not more reasonable to presume that the apparent limitation was a mere oversight, that section 1 of title II was in the nature of an introductory preamble, and that the real intention was as specifically expressed in the enacting clause, rather than to assume an intention to completely abandon the prior law and adopt a wholly *new, different, and dual* procedure?

That construction should be adopted which is in and of itself the more reasonable.

To hold that the apparent limitation contained in section 1, title II, was intentional, would violate many proper canons of construction. It would be in direct conflict with the enacting clause.

It would conflict with section 13

"that the grand jury have power, and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court either by presentment or indictment, as provided in this act."

Here is a grant of power to the grand jury to inquire into *all crimes*, and not merely those enumerated in title I.

It would be in conflict with the latter portion of section 10, title II, providing:

"the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in title one of this act *as those that are defined in other laws of the United States.*"

For the power is here granted in terms to inquire into all offenses "as well as to those that are designated in title I of this act as those that are defined in other laws of the United States."

It would violate the presumption against implied repeals.

It would violate the rule requiring a statute to be considered as a whole in determining the meaning of a part.

It would violate the construction of the act by its author, the late Senator Carter, who, in his introduction to the Alaska code, said with reference to the acts of March 3, 1899, and June 6, 1900, making further provision for a civil government:

"The two acts last named embrace a criminal code, a code of criminal procedure, a political code, a code of civil procedure, a civil code and certain license taxes for the District."

"The codes were mainly copied from the statutes of the State of Oregon, and to the end that adjudications by the Supreme Court of that State might remain *as directly in point as possible*, changes were sparingly made in the text of sections."

It would violate the construction which other departments of the Government have placed upon the law.

Section 1024, R. S., came from the act of February 26, 1853. Congress never placed upon the act the construction now contended for, or believed it applicable to the territories; for a portion of the act was specifically extended to the Territories of Minnesota, New Mexico, and Utah (10 Stats., 671) in 1855. Again, in 1882, it was extended to the Territories of New Mexico and Arizona.

Had the act by its own operative force extended to the Territories, such legislation would have been unnecessary.

And more, it is significant that in the extension of the act to these particular Territories only a portion was so extended. That part which afterwards became section 1024, R. S., was *not* made applicable.

So, on the adoption of the "New Penal Code" (35 Stats., 1088) March 4, 1909, Congress, in extending certain crimes to the Territories, provided specifically in section 315:

"Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment."

Obviously, if section 1024 did apply to the Territories as here contended, such legislation was useless.

So the territorial legislature of Alaska, as set forth in respondent's brief on April 26, 1913, passed an act amending section 43 of the act of criminal procedure so as to make it correspond with section 1024 of the Revised Statutes, this clearly indicating their opinion *that the law could not be as here contended for without the aid of statutory enactments.*

Since the point has been raised in the case at bar, the Department of Justice in the conduct of its business in Alaska itself made a *practical construction* of the law as here contended for by the petitioner, and in the Government's brief filed in this very case, when pending on writ of error to the Circuit Court of Appeals for the Ninth Circuit, it was said on page 202:

"Since this question was seriously raised, the United States Attorney's office at Juneau has had to be excused from prosecuting two cases under the white slave traffic act because success seemed impossible without *joining two or more counts in the same indictment*, and the cases had to be brought in Washington as a consequence."

But assuming the apparent limitation contained in section 1 of title II intentional and deliberate, what is the effect? Does it not leave the law in the same status in which it existed from 1884 to the time of the passage of the act of 1899?

If, by the act of 1899, the procedure thereunder specified is limited to the crimes defined in title I, does it not necessarily follow that the procedure for crimes *not* set out in part one remains the same as it existed prior thereto?

Can it, with any show of reason, be said that a limitation of the procedure set forth in the act to the crimes defined therein in and of itself operates as a repeal of the prior law with reference to the procedure in offenses not set forth therein?

If, as claimed, the language employed in section 1, title II, is in fact a limitation of the procedure to the offenses defined in title I, is not the procedure for other offenses not so defined just as it was prior to the act of 1899—that is to say, as it was *under the law of Oregon?*

c.

Error in the Reasoning of the Lower Courts.

The opinion of the trial court in the so-called "Transportation Cases," which was rendered just prior to the decision in the case at bar, and was therefore controlling, is printed as an appendix to respondent's brief, and to that the court's attention is now invited.

The learned court below, after admitting that the point was not without difficulty, proceeded to find that the court had a *dual jurisdiction*.

It was next found that by reason of the language employed in section 1 of title II the procedure provided for in the act of 1899 was limited in its operative effect to the crimes defined in title I, and therefore that such procedure had no application to crimes not so defined.

Concluding from this that this whole class of crimes must be prosecuted under some other and different procedure, the court proceeded to discover, if possible, what it was.

Finding that section 10 provided that:

"grand juries to inquire of the crimes designated in title I of this act, committed or triable within said district, shall be selected and summoned and their proceedings shall be conducted in the manner pre-

scribed by the laws of the United States with respect to grand juries of the United States district and circuit courts,"

and further finding that this provision conflicted with chapter 5 of title II, dealing with the proceedings of grand jurors in a manner substantially the same, but in some respects perhaps different from those prescribed by the Revised Statutes, the court arrived at the conclusion:

"It is apparent that the framers of section 10 had in mind dual procedure for the District Court for the District of Alaska in the prosecution of crimes, because the code of criminal procedure prescribes a procedure which governs grand juries while they are investigating local or territorial crimes, but section 10 provides that the grand juries shall be governed by the rules of proceedings prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts."

In other words, because section 10 provided that grand juries in their investigation of crimes set forth in title I should be governed in their proceedings by the general laws of the United States and because this provision apparently conflicted with other sections of the same act; therefore *a dual system of procedure was adopted, not only as to the proceedings of grand juries, but as to the form and substance of the indictment and the whole progress of the trial.*

We insist that no such conclusion legitimately or at all flows from the premise, but on the contrary, respectfully submit, that a moment's consideration will disclose that all that was meant by section 10 was that the laws of the United States, etc., should apply in the proceedings of grand juries when there was no local procedure to the contrary.

Given this reasonable, and we respectfully suggest, plain and common sense interpretation, *the section readily harmonizes itself with the other provisions of the act.*

Even if there were a conflict, irreconcilable, between the provisions of section 10 and those of other sections of the

act, is this conflict to be reconciled by admitting a dual system of procedure, *not only as to the proceedings of the grand jury, but as to the form and substance of the indictment as well as the conduct of the trial*, when no intention on the part of Congress so to do appears otherwise than by reason of the *apparent conflict*.

The error of the court lay in assuming because of this apparent conflict as to the manner of conducting the proceedings of the grand jury that it was the intention of Congress to impose upon Alaska a dual system of procedure, both as to the form and substance of the indictment and as to the rules affecting the conduct of the trial.

The court next justified its ruling on the ground that because—

1. It had a dual jurisdiction, and
2. R. S., 1891, extended to the Territories the Constitution and laws of the United States not locally inapplicable,

"the provisions of the general statutes of the United States governing the procedure in the Federal courts,"

were applicable to the Territory.

But it will be observed that *this is in the very teeth of the repeated decisions of this court. Cited supra.*

The court also said:

"The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law."

The Court had entirely overlooked
Fitzpatrick vs. U. S., supra,

which was a prosecution under section 5339, R. S., where the District Court for the District of Alaska *was exercising the jurisdiction of a district court of the United States as dis-*

tinguished from that of a territorial court, as well as the cases of

Reynolds vs. U. S., supra,

and

Miles vs. U. S., supra,

in each of which a similar condition prevailed.

Finally the court justified its ruling on the ground that inasmuch as it *was* clothed with a dual jurisdiction, it *ought* to be furnished with the same rules of procedure, "which the light of experience has proved to be adequate and satisfactory in the prosecution of offenses of the character charged in the indictment."

In answer to this, we respectfully submit, *it is a question for Congress, not the court.*

The Circuit Court of Appeals for the Ninth Circuit rested its judgment upon precisely the same reasoning set forth in the opinion of the trial court, and upon the further ground

"but aside from the intention of Congress as expressed in the acts specifically relating to Alaska, which we have just considered, there is no substantial reason here why that clause in the act of February 26, 1853, which became section 1024 of the Revised Statutes, does not now apply to all Territorial courts, as well as to the circuit and district courts of the United States in all cases of offenses against the laws of the United States."

We respectfully suggest that the "substantial reason" is because this court, through a long line of decisions, beginning in 1871 with

Clinton vs. Englebrecht

and ending in 1899 with

Fitzpatrick vs. U. S.,

had held the exact contrary.

Either the general laws governing the procedure of the district and circuit courts of the United States apply in the Territories or they do not. This court has said they do not.

The unspeakable situation which would arise if certain laws of procedure were held to apply and others not needs no comment. Neither the practitioner nor the court would be able to say with any degree of certainty at any stage of any proceeding what particular rule applied until each in turn had been passed upon by the appellate courts.

The proposition that even assuming the language of section 1 of title II of the act of 1899 limited the procedure therein set forth to the offenses defined in title I, the law prohibiting the charging of more than one crime in an indictment nevertheless remained as between 1884, and the passage of the act of 1899 was not adverted to in the decision of either of the lower courts.

d.

The Reasoning and Cases Relied upon Here.

Coming to the reasoning and cases relied upon by respondent to sustain its position in this court, it is said:

The alleged error was immaterial because:

a. "Petitioner received no greater sentence than must have been imposed on a conviction of one crime only."

b. "Prejudice cannot be shown because the error might have been cured had petitioner gone to trial."

c. "The error was one of form cured by section 1025, R. S."

The time of the court will not be occupied in serious discussions of these positions.

If sound, the positive, substantive provisions of the law of Oregon made applicable to Alaska by the act of 1884, and since re-enacted by that of March 3, 1899—

"That the indictment must charge but one crime and in one form only."

"That the defendant may demur to the indictment when it appears upon the face thereof that more than one crime is charged in the indictment,"—

means simply nothing. Such a view would make of the statutory law upon the subject, a cruel but humorous satire.

The petitioner will not be denied a trial according to the law of the land, because he received only the *minimum sentence*, or because he *might* have been acquitted had he introduced testimony, or because the district attorney *might* have dismissed the indictment, or *might* have been compelled to elect to stand on one count.

It is next said:

"The practice in this case is governed by section 1024 of the Revised Statutes of the United States, and not by section 43 of the Alaska Code,"

because:

"1. The penal and criminal procedure codes apply only to the crimes therein mentioned, and not to crimes defined in the Revised Statutes or other general laws of the United States."

This position was fully examined in the discussion of the opinions of the lower courts. No argument new or different from that therein contained is here advanced by respondent.

"2. The general laws of the United States not locally inapplicable are in force in Alaska."

This may be admitted arguendo. It proves nothing. As pointed out, inasmuch as *either* section 43, title II, of the act of 1899, *or* the law of Oregon as it stood from the passage of the act of 1884 to March 3, 1899, covered the precise question of procedure, section 1024 was *locally inapplicable*. As expressly said in

Hornbuckle vs. Toombs, supra:

"Laws regulating the proceedings of the United States courts are of specific application, and are in

truth and in fact locally inapplicable to the courts of the Territory."

To support this contention for a dual system of procedure in Alaska, respondent says in effect: Congress did not confer this dual jurisdiction without providing a procedure; that specified in the act of 1899 does not apply; therefore the Federal procedure *necessarily* governs prosecution of Federal offenses.

Why not the procedure which existed in the Territory prior to the passage of the act of 1899? How respondent arrived at the conclusion that

Reynolds vs. U. S.,

Miles vs. U. S.,

and

Fitzpatrick vs. U. S. (supra)

were prosecutions for a *local crime* is not observed. It fully appears in the decision in each case that they were prosecutions under sections of the Revised Statutes, and the court in conducting the trials was *exercising the jurisdiction of a district court of the United States*, and not that of a territorial court.

Cochran vs. U. S., 147 Fed., 206,

decided by the Circuit Court of Appeals for the Eighth Circuit as late as 1906, in which the whole learning upon the subject is reviewed, has not been adverted to by respondent.

The cases relied upon by respondent are somewhat wide of the mark.

Because in

United States vs. Pacific and Arctic Co., 228 U. S., 87,

this court refused to dismiss a writ of error brought by the United States to review a judgment of the District Court of Alaska, and because it was held in

Hyde vs. Shine, 199 U. S., 62,

that the District of Columbia is a district of the United

States within section 1014, R. S., authorizing the removal from one district to another of persons charged with crime, it does not follow that section 1024, R. S., governs the procedure in Alaska.

It is true that in

Hornbuckle vs. Toombs (supra),

the precise question here presented was reserved; but, as pointed out, it was later decided in the four cases—

Reynolds vs. United States,

Miles vs. United States,

Fitzpatrick vs. United States,

Cochran vs. United States (all supra)—

adversely to the contention of respondent.

It is true that in

Keys vs. United States, 27 Fed., 351,

Judge Deady held that the grand jury should be summoned and drawn in accordance with the provisions of the Revised Statutes of the United States.

But this was because, inasmuch as there was *no county organization in Alaska*, the laws of Oregon upon that subject were inapplicable, and the court said:

"The following sections of the Code providing for the selection of jurors and the formation of the jury list by the county court from the assessment roll, are, of course, *inapplicable, as there are no county courts nor assessment rolls in Alaska.*"

Where the Oregon law *was applicable*, however, it was sustained, and in determining the qualifications of the jurors Judge Deady said:

"But the question as to who is qualified to serve as a juror in the district court of Alaska must be answered *by the law of Oregon.*"

II.

Will an indictment invalid on demurrer for that it charges more than one crime become valid through a change in the statute law made subsequent to the filing of the demurrer?

It is contended that because of the act of the territorial legislature of Alaska of April 26, 1913, printed as an appendix to respondent's brief herein, so amending section 32, title II, of the act of March 3, 1899, as to make it conform to the provisions of section 1024, R. S., this case cannot be reversed upon the point of practice herein raised, for that the decision must be in accordance with the law *now* in force and not that applicable at the time of the ruling of the court on the demurrer.

Respondent's argument is predicated upon the assumption that no change in mere procedure renders a law *ex post facto*. *This is a mistake.* There are many changes in procedure, or the character or quantity of evidence, which may become as objectionable as *ex post facto* laws as one of substantive import; in fact, many laws of procedure *become substantive*.

What the result of this territorial law might have been if passed after the alleged commission of the crimes charged, but before indictment, or even after indictment, but before demurrer interposed, need not be here decided. It may be admitted by way of argument that under either of these circumstances its operative effect would not have been *ex post facto*.

When, however, the indictment had been found, and a proper demurrer duly interposed, defendant acquired the right to have his decision upon his demurrer according to the law as it then was. *He acquired a vested right in that law of procedure as it then stood.* Any future change would, in its operative effect, be *ex post facto* as to him.

Any change in the law, whether relating to pleadings, evidence, or practice, which so operates as to affect a substantial right of the defendant adversely to his interests is to him ex post facto.

It would indeed be an anomaly if, assuming the defendant innocent and his point on demurrer well taken, he should be now rewarded for standing on his rights by a term of five years in the penitentiary because, forsooth, *the legislature has changed the law pending his appeal!*

In asserting and standing firmly upon their rights resisting the aggressions of Government defendants are not required to gamble, as suggested in respondent's brief, upon the possibility of the law being *changed to their disadvantage* pending the determination of their writ of error or appeal.

Consider petitioner's position. He believed his point well taken under the repeated decisions of this court, the Circuit Court of Appeals for the Eighth Circuit, as well as that for the Ninth. His opinion was not *wholly* unwarranted in law. He elected to stand on his demurrer; otherwise he might have again interposed his plea of not guilty, and put himself on his country.

Under these circumstances, surely he acquired a substantive legal right to have his demurrer adjudged according to the law of the land. Would not any subsequent change in the law validating that which at the time of his demurrer was *confessedly invalid* operate injuriously on the right which he thus acquired?

If so, then no error, no matter how *flagrant* or arbitrary, so long as it referred merely to procedure, pleading, evidence, practice, would be reversed, provided only the legislature cured the defect pending appeal.

Nor is the position maintained in any judicial utterance of which we are aware. As to the civil cases cited, they are not even analogous.

Neither is it necessary to examine in detail the criminal cases cited, for in none of them did the law involved operate

in, the slightest degree against any substantial right of defendant, and in no case had he secured any such *vested right* in the particular law or pleading, practice, or evidence as in the case at bar.

It is not here contended that the legislature may not alter the law on a mere question of pleading or practice *after the offense and before trial*. All that is urged is that this alteration cannot occur after trial when the right of the defendant to have his case adjudged according to the law of the land has fully and in all respects *attached*.

For cases more closely in point than those cited by respondent, the attention of the court is invited to

Kring vs. U. S., 107 U. S., 221.

This was a prosecution for murder. By the law of Missouri at the time of the homicide a conviction of murder in the second degree was an acquittal of the crime in the first, but before defendant entered his plea the law was changed so that by force of its provision if a judgment on that plea be lawfully set aside it would not be held to be an acquittal of the higher crime.

A judgment against him on a plea of guilty to murder in the second degree was reversed and on a new trial he was convicted of murder in the first degree.

It was held (the Chief Justice, Mr. Justices Matthews, Bradley and Gray dissenting) that the change in the law after the commission of the offense charged and before the entry of the plea was in its operative effect on the defendant in that case *ex post facto*.

And while the court differed on the application of the rule to the facts of that particular case, there was no controversy as to the principle involved or the correct statement of the rule, for it was said by the majority:

"But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crimes, is not an *ex post facto*

law, if it comes within either of these comprehensive branches of the law designated as pleading, practice and evidence.

"Can the law with regard to appeals, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

"And can a substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by an *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

And the minority said:

"There are doubtless many matters of mere procedure which are of vital consequence, but in respect to them, the power of Congress as to crimes against the United States is restrained by positive and specific limitations. * * *

"But in addition to these matters of procedure which are specially protected against legislative change, either for the past or the future, there may be others in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws.

"Every case must be decided upon its own circumstances, as the question continually arises and requires an answer; but it is a familiar principle that before rights derived under public laws have become vested in particular individuals the State, for its own convenience and the public good, may amend or repeal the law without just cause of complaint.

"In respect to criminal offenses, it is undoubtedly a maxim of natural justice embodied in constitutional provisions that the quality and consequence of an act shall be determined by the law in force when it is committed. * * *

"But matters of possible defense which accrue under provisions of positive laws, which are arbitrary and technical, introduced by public convenience, or for

motives of policy, which do not affect the substance of the accusation or defense, and form no part of the *res gestæ*, are continually subject to the legislative will, unless, in the meantime, by an actual application to the particular case, the legal condition of the accused has been actually changed. *His right to maintain that status, when it has become once vested, is beyond the reach of subsequent law."*

The court will not fail to observe that this is all that is claimed in the case at bar. It is not urged that petitioner had any vested right to have the practice remain after the commission of the offense and before trial, as it had been theretofore.

But it is insisted that after trial and

"by an actual application to the particular case, the legal condition of the accused has been actually changed. His right to maintain that status, when it has become once vested, is beyond the reach of subsequent law."

Also to the case of

Thompson vs. Utah, 170 U. S., 351,

where it was held (Mr. Justice Brewer and Mr. Justice Peckham dissenting) that the provision in the constitution of the State of Utah providing for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State.

But should the court sustain the position of respondent with reference to its contention that the language employed in section 1, title II, of the act of 1899 limited the procedure therein specified to crimes defined in title I, then it is submitted that the act of April 26, 1913, of the Territorial Legislature is not in point and applies only to offenses defined in title I, and that any question in the case at bar being not so defined is under the Oregon rule in force prior to the act of March 3, 1899.

III.

Is an act of Congress passed for the Territory of Alaska under the terms of which a defendant in a criminal case, after demurrer overruled, may waive both jury and trial and receive sentence without a plea of guilty valid?

Section 97, title II, of the act of 1899, providing a code of criminal procedure for the Territory of Alaska, provides:

"That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

January 8, 1912, petitioner demurred on the ground, among others, that more than one crime was charged in the indictment (Tr., 143). On the same day, without argument, the demurrer was overruled (Tr., 143), and petitioner entered a plea of not guilty and put himself upon the country (Tr., 144).

May 18, 1912, upon leave of court, petitioner withdrew his plea of not guilty and resubmitted his demurrer, which was again overruled (Tr., 163).

May 20 petitioner filed in the trial court his notice of election, signed by himself, to stand on his demurrer, in this connection saying:

"The defendant, C. M. Summers, now gives his notice of election to stand upon the said demurrer and not further plead and to take advantage of the provisions of sec. 97 of the Alaska criminal code of procedure, and to submit to the judgment thereunder and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit."

On the same day respondent filed its written objection to petitioner's standing on his demurrer on the ground that

section 97 did not apply, but that the case was governed by sections 1026 and 1032, R. S.

May 21 the court made and filed its written order wherein, after reciting the conduct of petitioner in the premises and the objection of respondent

"to the entry of judgment until the case has been submitted to a jury for trial and a verdict rendered herein,"

it was further said:

"The defendant, C. M. Summers, *may waive trial by jury* if he so elects and have judgment entered against him pursuant to the provisions of sec. 97, part two, of the Alaska Penal Code" (Tr., 181).

In view of the foregoing record, the question is squarely presented as to whether or not the foregoing act under which petitioner elected to stand and upon which judgment was entered is a valid exercise by Congress of its constitutional power.

Though the point was raised by the United States Attorney in the trial court, it is not discussed in the opinion of the presiding judge.

The Circuit Court of Appeals decided that no question of waiver of a jury trial was involved; that there was no issue to try, and therefore no occasion for a jury; that the statute was no more than an expression of the common law making it mandatory upon the court to permit a plea of *respondat auster* after demurrer overruled instead of discretionary. This is the argument here.

Says respondent, the constitutional right to a trial by jury is only such trial by jury as existed under the common law at the time of the adoption of the Constitution; then, after demurrer to an indictment for felony was overruled, the privilege to plead over was of favor and not of right, and the court, if it is so desired, could enter judgment and impose sentence without further plea. From this it is argued that there was no infraction of petitioner's constitutional rights.

Reducing, for the purpose of investigation, this argument to a simple syllogism, it stands:

The Constitution guaranteed only such rights as existed at common law.

The right to a jury trial after demurrer overruled did not exist at common law.

Therefore, the right to a jury trial after demurrer overruled was not guaranteed by the Constitution.

Even the minor premise is unsound, for whatever may have been the rule in the earlier stages of the common law, the right to plead over after demurrer overruled had, at the time of the adoption of the Constitution, become the *practical*, if not the theoretical, rule.

For, as said by Blackstone in discussing the adjudicated cases upon the subject:

"Some have held that if, on demurrer, the point of law shall be adjudged against the prisoner, he shall have judgment and execution as if convicted by verdict. But this is denied by others, who hold that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him; which appears the more reasonable, because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shown it appears to be felony, the court will not record the confession, but admit him afterward to plead not guilty.

"And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the court will not suffer him by such niceties to lose his life."

4th Blackstone, 333.

So it may be suggested that even though judgment of guilty might be pronounced on demurrer overruled under the common law, it does not follow that such should be the

rule in this country, particularly where the demurrer is both general and special in its nature, and goes to matters which could be reached only by motion to quash or special pleas in abatement under the common-law system.

For it might be argued where the demurrer was general and predicated upon the theory that the facts alleged did not constitute a crime, this was a confession of the acts set forth, and taken in connection with a refusal to further plead, might be treated as in the nature of a plea of guilty.

But such reasoning could not apply to the case at bar where the demurrer was also special and on the ground that more than one crime was charged in the indictment; for here there is not even the semblance of confession of fact.

But conceding *arguendo* the minor premise, the major can in no event be sustained.

While it is true that in the interpretation of the Constitution the meaning of certain words, among others "crime," "trial," "jury," will be sought for in the common law of England as it then existed, with a view of ascertaining the precise sense in which the particular term was employed, it by no means follows that the meaning of these terms having been discovered, the right will exist as at common law, for most clearly the *right* will exist as provided by the Constitution itself.

The Constitution does not say the trial of all crimes, *which were triable at common law by jury*, shall be tried by jury. Its provision is

"The trial of *all* crimes, except in cases of impeachment, shall be by jury."

At common law the right of trial by wager of battle existed, and this right was recognized by the court of King's Bench as late as the first quarter of the nineteenth century, nearly fifty years after the adoption of our Constitution, and required an act of Parliament for its elimination from the English practice. As well might it be argued, that if at

the time of the adoption of the Constitution there were certain crimes in England triable by wager of battle only, or in the Star Chamber, or the ecclesiastical court without a jury, such crimes would not be within the guarantee of the Constitution, because the right of trial by jury thereof did not exist at common law.

Whenever there is a prosecution for a crime under the laws of the United States, two things must concur: First, there must be a *trial*, and, secondly, that trial must be by *jury*. If there be pronouncement of judgment on the verdict of a jury *without trial* or judgment with trial, but *without the verdict of a jury*, the judgment contravenes the plain mandate of the Constitution. Both must concur—the trial and the jury. *In the case at bar there was neither.*

That at common law there might be a judgment of conviction on demurrer overruled proves nothing, for the most that could be said of this procedure would be that it was a trial, and even conceding, for the purpose of argument, that it was in *fact a trial*, no one will contend that it was a trial by jury.

When it is said that under the Constitution one is entitled to a trial by jury in such cases *only* as he was so entitled under the common law of England, the statement is entirely too broad.

Yet it is contended:

“The right to a trial by jury is the right as it existed at common law.”

But the proposition is not, and was not intended to be, sustained by the authorities cited. It is true that in

Callan vs. Wilson, 127 U. S., 540,

the court said (p. 549):

“In our opinion the provision is to be interpreted in the light of the principles which at common law determine whether the accused, *in a given class of cases*, was entitled to be tried by jury.”

But this language was used in determining the definition of the word "*crimes*" as used in the Constitution, and such was the purpose of the language employed in

Schick vs. U. S., 195 U. S., 65,

while in

Thompson vs. Utah, 170 U. S., 343,

similar language was employed to ascertain the meaning of the term "*jury*," whether by common law it meant twelve or a less number of men.

And while it is perfectly proper, as has been pointed out, to look to the common law to ascertain the meaning of the words, nevertheless, when once the meaning of these terms has been ascertained, there is nothing left for construction.

"The trial of all crimes, except in cases of impeachment, shall be by jury."

No matter what the common law of England at the adoption of the Constitution may or may not have been, from then on the trial of *all* crimes must be as specified.

But it is argued that if there can be a judgment of conviction on a plea of guilty, so can there be under an enabling statute on a refusal to plead further after demurrer overruled.

But the fallacy of this argument is apparent, for it rests upon the assumption that a plea of guilty is the same as, and the equivalent of, a refusal to plead further upon demurrer overruled. That there is no similarity between the two cases is obvious.

In the former, there is no issue of fact to be tried. The guilt is admitted, and to impanel a jury to ascertain and pronounce that which is admitted, would be a mere useless and idle act. If, however, there is the slightest doubt as to the possibility of error in fact, the plea will not be allowed, as if defendant be under duress or of unsound mind, or the plea be tendered for the protection of some third party.

On demurrer overruled, however, particularly where the demurrer is general and also special and to the form of the indictment, no such situation exists. There is no presumption of guilt. On the contrary, the presumption is in favor of the accused. It is a presumption of fact, as well as law, and must be overcome by evidence of fact indicating guilt. The case stands exactly as if defendant were brought into court and refused to enter any plea in the first instance. *An issue of fact remains.*

There is no manner in which this remaining or resulting issue of fact can be determined, except by trial in the manner set forth in the Constitution, *i. e.*, by jury, and it is this remaining issue of fact in the one case, and its absence in the other, which distinguishes a judgment upon plea of guilty from one upon demurrer overruled. Every reason which would prevent the court from passing sentence in the one case without plea, trial or jury, applies with equal force to the other.

It is one of the great principles of our system of criminal judicature that in no event is there to be a conviction of the innocent. Such a contingency is against the theory of our civilization. The Constitutional safeguards are thrown around those accused of crime for the express purpose of shielding and protecting them, not alone from any wrongful action of Government, but also against the consequences of their *own trustfulness, inadvertence, or negligence.*

The innocent, conscious of no guilt, may prefer the submission of their cause to some judge, calculated by learning, experience, and known integrity to be more capable of a correct analysis of evidence and human motives in a complicated case of fact than any jury, *but it is just this which the Constitution sternly forbids.* As was well said in

State vs. Carman, 63 Iowa, 130:

"The innocent person unduly influenced by his consciousness of innocence and placing undue con-

fidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards.

So one truly innocent in fact of the crime charged might, by reason of the mass of circumstantial evidence arrayed against him, the local prejudice of the community in the place at which a trial was forced upon him, the expense incident upon a defense upon the merits, lack of preparation, or the stress of a multitude of other causes, deem it the part of wisdom to rest his case upon some legal question involved in the form of indictment or the manner in which it had been procured. Such a course, it is believed, *is equally forbidden by the Constitution*.

In view of the foregoing considerations, respondent's contention cannot be sustained by the authorities cited and relied upon. In

West vs. Gammon,

the sole point was whether or not a judgment could be pronounced on a plea of guilty. In

United States vs. Quinn, 8 Blatch., 48,

it is true the judgment was entered upon demurrer overruled, but the question of the propriety of this practice, to say nothing of its legality, was not suggested or considered.

The fact that Congress shortly thereafter prohibited such conduct in the future proves nothing, for many of the most mandatory provisions of the Constitution are in terms re-embodied in statutory enactments.

Hallinger vs. Davis, 146 U. S., 319,

held merely that, the *Constitution of the State permitting*, the Legislature might enact:

"But if such person shall be convicted on a confession in open court, the court shall proceed by

examination and witnesses, to determine the degree of the crime and to give sentence accordingly.

The case is hardly authority to the point that under the *Federal Constitution* there can be a pronouncement of guilty without any plea thereof, and with *no examination* to determine the degree of guilt, if any. In

United States vs. Lair, 195 Fed., 49,

defendant pleaded *nolo contendere*, and a sentence was imposed, but upon the express ground that such plea *was in effect and fact a plea of guilty to every essential element of the offense*. The question as to whether or not such plea was acceptable in a case of felony was not raised or discussed.

But in

Tucker vs. U. S., 196 Fed., 261,

the Circuit Court of Appeals for the Seventh Circuit, *after reviewing all the learning upon the subject*, pointed out that such plea cannot be accepted in cases of felony requiring infamous punishment to be imposed on conviction, and reversed a case where the plea had been accepted and *evidence thereafter taken without the intervention of a jury*.

It is true that in

People vs. King, 28 Calif., 271,

the statute in question was said to be constitutional, but that was under a provision of the *State Constitution*, providing:

"The right to a trial by jury shall be secured to all and remain inviolate forever."

Very different, indeed, from that which provides:

"The trial of *all crimes shall be by jury*."

Again, in the *King* case, the constitutionality of the statute was not attacked. *It was conceded by counsel*, and

the expressions of the court arose collaterally and were not at all necessary to the decision of the question before it. In

Thomas vs. State, 6 Missouri, 457,

Ross vs. State, 9 Missouri, 686,

Hirn vs. State, 1 O. St., 16,

however, the action of the trial court was reversed in entering judgment upon the demurrer overruled, though it is true the constitutional point here involved was not discussed.

That petitioner could not, under the constitutional guarantee, waive a jury must be admitted.

Callan vs. Wilson, 127 U. S., 540.

Thompson vs. Utah, 170 U. S., 343.

Rasmussen vs. U. S., 197 U. S., 516.

Schick vs. U. S., 195 U. S., 65.

In the latter case it is true this court held that a jury might be waived, but upon the ground that the offenses therein involved were *not crimes within the constitutional provision*, and it was expressly said:

"There is no public policy which forbids the waiver of a jury in the trial of *petty offenses*."

and again,

"But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of *petty offenses* upon what ground can it be contended that a defendant therein may not voluntarily waive a jury?"

Neither do the other cases cited by respondent sustain its position. In

Queenan vs. Oklahoma, 190 U. S., 548,

Rodriguez vs. U. S., 198 U. S., 156,

Powers vs. U. S., 223 U. S., 303,

the question here presented was not even remotely raised or considered.

In

Diaz vs. U. S., 223 U. S., 442,

the question was as to the effect of the absence of accused during a *portion* of the trial with his *consent and at his own request*. It was held that his right to be present was a personal privilege which, *under certain circumstances*, might be waived. That this court by no means intended to intimate that he could waive all his constitutional guarantees is apparent, for the following language from

Thompson vs. Utah, *supra*,

was quoted and reaffirmed:

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the *consent of the accused*."

The reason of the rule forbidding the waiver of a jury by a defendant accused of crime is that it is in effect the substitution of a different tribunal than that authorized by law. When the prosecution involves a crime, as opposed to a petty offense, *the question is one of jurisdiction*. If there is no jury, there is no jurisdiction upon the court to make any finding of guilt. *It is simply not the tribunal commanded by the imperative terms of the Constitution*. In

Cansamie vs. People, 18 N. Y., 128,

it was said:

"The trial must be by a tribunal and in the mode in which the Constitution and laws provide without any essential change. The public office, prosecuting for the people, has no authority to consent to such a change, *nor has the defendant*."

"If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of

eleven might not be, and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with and the trial committed to the court."

In

State vs. Mansfield, 41 Missouri, 470,

it was said:

"His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can unquestionably waive many of his legal rights or privileges, he may agree to certain facts and dispense with formal proofs, he may consent to the introduction of evidence not strictly legal or forbidden, or forbear to interpose challenges to the jurors, *but he has no power to consent to the creation of a new tribunal unknown to the law to try his offense.*"

Many other cases might be cited to the same effect. It is believed the proposition is so firmly established in principle and reason as to render this unnecessary.

But it is contended that there is *no question of waiver* of jury involved in this case. Such was the theory upon which the petition for rehearing was denied by the Circuit Court of Appeals.

But this position is not sustained by the record, for the trial court expressly said:

"The defendant may waive trial by jury if he so elects" (Tr., 181),

and, as admitted in respondent's brief (p. 6), it was upon the supposed authority of

Diaz vs. U. S., supra,

that this ruling was made. Thus the trial court inferred that the question of trial by jury was a matter of personal privilege similar to the right to be present during the trial, as involved in the *Diaz* case.

But irrespective of the record, though upon this point it is conclusive, can it be denied that what transpired *was in substance and in fact*, if not in form, a waiver of examination of any facts indicating his guilt or innocence, and *thus a waiver of both trial and jury?*

In criminal phraseology the term "trial" means proceedings in open court after the pleadings are finished and the case is otherwise ready; down to and including the pronouncement of judgment.

If, now, it be agreed that, the trial being once begun, defendant could not by any process, *either express or implied*, waive a jury and thus confer a *forbidden jurisdiction* upon the court, how can it be said that he could do so before the trial started? Surely the greater includes the less, and a prohibition against the waiver of a jury is not avoided by waiver of *both trial and jury*.

Should the decision in the case at bar be affirmed, it will stand authority to the point that there is at least one class of cases in which there may be pronounced judgment of conviction *without plea of guilty, without examination of questions of fact, and without the intervention of a jury*. This doctrine will be pressed to the utmost limits of all its logical sequences. Will future courts in the shifting sands of governmental and political life have the firmness in hard cases of the clearest and most shocking guilt to resist its further extension to cases where a jury has been waived by *express* agreement of the parties after the trial has begun, and from there to waiver by *implication*?

As was well said in

Hill vs. People, 10 Mich., 351:

"Let it once be settled that a defendant may thus waive this constitutional right, and no one can see the extent of the evils which might follow, but the whole judicial history of the past must admonish us that very serious evils should be apprehended and that every step in that direction would tend to increase the danger. One act of neglect might be

recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially *frittered away*. The only safe course is to meet the danger *in limine* and *prevent the first step in the wrong direction*.

"It is the duty of the courts to see that the constitutional rights of a defendant in a criminal case shall not be forfeited, *however negligent he may be in raising the objection*."

It is most earnestly urged that neither in view of the history of the past nor in the light of the possibilities of the future should the door be opened. The guilt or innocence of petitioner will be of small moment to posterity, but any modification of the great principle herein involved may be attendant with the gravest consequences.

Speaking of summary proceedings authorized by certain acts of Parliament in particular cases, Mr. Blackstone said:

"And however convenient this may appear at first (as doubtless all arbitrary powers well executed are the most convenient), yet let it be again remembered that delays and *little inconveniences* in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters * * * and that, though begun in trifles, the precedent may be gradually increased to the utter disuse of juries in questions of the most momentous concern." 4 *Blackstone*, 350.

The aggressions of government are sometimes insidious. It is step by step through the years that the ground is lost or gained. A hard case arises, and the courts are pressed to so modify or extend certain principles, which ought to be unchanging, as to cover that particular controversy. Thus in

* *Crane vs. U. S.*, 162 U. S., 625,

the record disclosed the appearance of the prosecuting attorney and the accused, in person and by his attorney, an

order by the court that a jury come to try the issue joined, the selection of the jurors, the swearing of the jury, the trial, the verdict and the judgment in accordance therewith. Only the *formal arraignment* of defendant did not appear, and this court was urged to supply that vital omission either by *presumption* that it was in fact made or by holding that the arraignment was a mere *matter of form* which affected no substantial right of the accused. If this court had yielded to the persuasive argument in that case, the doctrine soon would have been again pressed, to other matters, just as it is now sought to extend *just a little further* the doctrine announced in the "*Schick*" and "*Diaz*" cases.

Finally, it is submitted that here is a case wherein from aught that appears of record petitioner *may* be innocent.

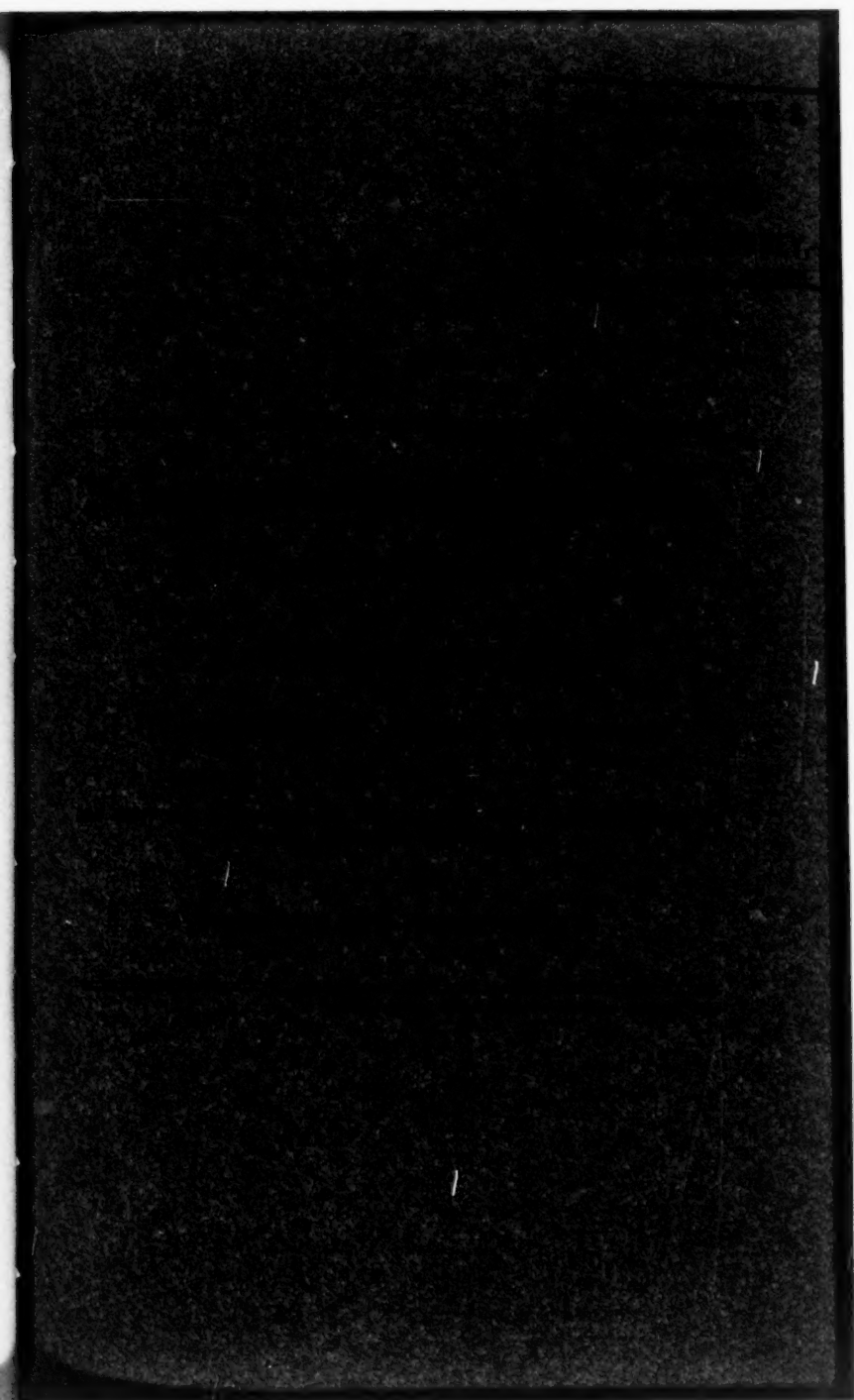
He relied upon the judgment of his counsel as to a matter of practice without ever having confessed his guilt, but, on the contrary, *having denied it*, and with no investigation as to the fact thereof he stands under sentence to a term of five years in the penitentiary, not necessarily because in the slightest degree *guilty as charged*, but solely through an error of *judgment on the part of his counsel* as to a matter of law.

Such situation is conceived to be repugnant to the fundamental principles of the administration of criminal justice, and foreign to the genius of our Government.

It is respectfully submitted that for the reasons hereinbefore set forth, the judgment herein complained of should be reversed.

Very respectfully,

ALDIS B. BROWNE,
ALBERT FINK,
Attorneys for C. M. Summers.



INDEX.

	Page.
STATEMENT OF THE CASE	1-5
BRIEF OF ARGUMENT	5-6
ARGUMENT	6-42
I. Petitioner has not been deprived of any constitutional or statutory right to trial by jury	6
A. The Constitution conferred no right to trial by jury on the pleadings in this case	6-8
1. The right to trial by jury is the right as it existed at common law	6-7
2. At common law when a demurrer to an indictment, whether for misde- meanor or felony, was overruled, the defendant had no right to plead over, but the court entered judg- ment and imposed sentence	7-8
B. All statutory rights were fully accorded petitioner	8-15
1. Section 1026 gave the right, but did not impose the necessity, of trial by jury	8-14
Section 1032, R. S., is not applicable to this case, for petitioner did not stand mute	13
Judgment entered in this case was the proper one, whether it be governed by section 1026, by the common law, or by the Alaskan Criminal Procedure Code	14
2. When petitioner stood on his demur- rer he was bound by his election ...	14-15

ARGUMENT—Continued.

Page.

II. This court will decide the case on the present law; that law authorizes the joinder of several offenses, and the judgment below will not be reversed if upon rehearing the same order must be entered	15-25
The amendment of section 43, Criminal Procedure Code, is not <i>ex post facto</i>	21-25
III. The alleged error was immaterial	25-27
(a) Petitioner received minimum sentence for one offense	25
(b) Any error might have been cured had petitioner gone to trial	26
(c) Any error was one of form cured by section 1025, R. S.	26-27
IV. The practice in this case is governed by section 1024, Revised Statutes of the United States, and not by section 43 of the Alaska Code	28-42
1. The Penal and Criminal Procedure Codes of Alaska apply only to the crimes therein mentioned, and not to crimes defined in the Revised Statutes or other general laws of the United States	28-33
2. The general laws of the United States not locally inapplicable, including section 1024, R. S., are in force in Alaska	33-42
(a) Section 1891, Revised Statutes of the United States, provides, etc.	33-34
(b) Section 1024 is locally applicable to Alaska	34-37
3. A dual system of procedure does exist in Alaska	37-42
A dual system is recognized by the Alaskan Code	38
Petitioner's cases distinguished	39

III

	Page.
CONCLUSION	42
APPENDIX	43-56
Appendix I.—Opinion of Judge Lyons in <i>United States v. The North Pacific Wharves and Trading Company</i> ..	43
Appendix II.—Territorial act of April 26, 1913, amending section 43 of Alaskan Code act	56

CASES CITED.

	Page.
<i>Benson v. Henkel</i> , 198 U. S., 1, 13.	36, 38
<i>Bird v. United States</i> , 187 U. S., 118.	41
<i>Callan v. Wilson</i> , 127 U. S., 540, 549.	7
<i>Claassen v. U. S.</i> , 142 U. S., 140.	25
<i>Clinton v. Englebrecht</i> , 13 Wall., 434.	39
<i>Com. v. Adams</i> , 127 Mass., 15.	26
<i>Com. v. Brown</i> , 121 Mass., 69, 78.	24
<i>Com. v. Packard</i> , 5 Gray, 101.	26
<i>Connors v. United States</i> , 158 U. S., 408.	27
<i>Craig v. State</i> , 49 Oh. St., 415.	7
<i>Diaz v. United States</i> , 223 U. S., 442, 454.	6, 15
<i>Dinsmore v. Southern Express Co.</i> , 183 U. S., 115.	17
<i>Duncan v. Missouri</i> , 152 U. S., 377.	21
<i>Embry v. Palmer</i> , 107 U. S., 3, 9.	36
<i>Ex parte Crow Dog</i> , 109 U. S., 556, 560.	37
<i>Fitzpatrick v. United States</i> , 178 U. S., 304.	34
<i>Gibson v. Mississippi</i> , 162 U. S., 565, 590.	21
<i>Good v. Martin</i> , 95 U. S., 90.	40
<i>Hallinger v. Davis</i> , 146 U. S., 314, 318.	7
<i>Hallock v. United States</i> , 185 Fed., 417.	23
<i>Hopt v. Utah</i> , 110 U. S., 57.	21, 22
<i>Hornbuckle v. Toombs</i> , 18 Wall., 648.	39, 41
<i>Hubbard v. Gilpin</i> , 57 Mo., 441, 444.	18
<i>Hyde v. Shine</i> , 199 U. S., 62, 75.	37
<i>In re Cooper</i> , 138 U. S., 404; 143 U. S., 472, 494, 510.	36
<i>In re McQuown</i> , 11 L. R. A., N. S., 1136, 1138.	14
<i>Interstate Commerce Com. v. Humboldt S. S. Co.</i> , 224 U. S., 474, 481.	33
<i>Keller v. The State</i> , 12 Md., 322.	18
<i>Kie v. United States</i> , 27 Fed., 351.	28, 34

V

	Page.
<i>Mallett v. North Carolina</i> , 181 U. S., 589	21
<i>Mathis v. State</i> , 31 Fla., 291	23
<i>Marion v. State</i> , 20 Nebr., 233	24
<i>McAllister v. United States</i> , 141 U. S., 174	36
<i>Miles v. United States</i> , 103 U. S., 304, 310	40
<i>Mills v. Green</i> , 159 U. S., 651, 653	25
<i>Mills v. State</i> , 52 Ind., 187	26
<i>Moss v. United States</i> , 23 App. Cas., D. C., 475	37
<i>Muskogee National Telephone Co. v. Hall</i> , 64 S. W., 600	18
<i>Myers v. Hollingsworth</i> , 26 N. J. Law, 186, 191	18
<i>Myers v. State</i> , 92 Ind., 390, 394	26
<i>Nagle v. United States</i> , 191 Fed., 141	33
<i>Page v. Burnstine</i> , 102 U. S., 664, 668	41
<i>People v. Chew Lan Ong</i> , 141 Calif., 550	7
<i>People v. King</i> , 28 Calif., 265	14
<i>People v. Syracuse</i> , 128 App. Div., 702	20
<i>People v. Taylor</i> , 3 Denio, 91	8
<i>Perry v. Minneapolis Street Ry. Co.</i> , 72 N. W., 55; 69 Minn., 165	19
<i>Pointer v. United States</i> , 151 U. S., 396	26
<i>Powers v. United States</i> , 223 U. S., 303, 312	15
<i>Pugh v. McCormick</i> , 14 Wall., 361	16
<i>Queenan v. United States</i> , 190 U. S., 548, 551	15, 18
<i>Reg. v. Faderman</i> , 4 Cox C. C., 359, 370; 384	8, 9, 14
<i>Reg. v. Hendy</i> , 4 Cox C. C., 243	8
<i>Reynolds v. United States</i> , 98 U. S., 145	40
<i>Rodriguez v. United States</i> , 198 U. S., 156, 164	15
<i>Royal Ins. Co. v. Miller</i> , 199 U. S., 353, 369	21
<i>Schick v. United States</i> , 195 U. S., 65, 69; 72	7, 15
<i>Simpson v. Stoddard</i> , 173 Mo., 421, 476	19
<i>Smith v. Harris</i> , 12 Ill., 462, 466	13
<i>South v. State</i> , 86 Ala., 617	23
<i>St. Louis, etc., Ry. Co. v. Berry</i> , 93 S. W., 1107; 42 Tex. Civ. Apps., 470	19
<i>State v. Almy</i> , 67 N. H., 274	7
<i>State v. Buck</i> , 59 Ia., 382	26

VI

<i>State v. Hoyt</i> , 47 Conn., 518, 531	Page. 23
<i>State v. Norton</i> , 89 Maine, 290	8
<i>State v. Passaic Co. Ag. Society</i> , 54 N. J. L., 260	8
<i>State v. Pell</i> , 140 Ia., 655	24
<i>State v. Ryan</i> , 13 Minn., 370, 376	23
<i>Steamer Coquiltam v. United States</i> , 163 U. S., 346	36
<i>Thiede v. Utah</i> , 159 U. S., 510, 514	40, 41
<i>Thompson v. Missouri</i> , 171 U. S., 380, 386	21
<i>Thompson v. Utah</i> , 170 U. S., 343, 349	7
<i>United States v. Durland</i> , 65 Fed., 408, 413	27
<i>United States v. Folsom</i> , 38 Pac., 70	38
<i>United States v. Haskins</i> , 3 Sawyer, 262	37
<i>United States v. Lair</i> , 195 Fed., 47, 52	7
<i>United States v. Nye</i> , 4 Fed., 888	27
<i>United States v. Pacific & Arctic Co.</i> , 228 U. S., 87	3, 36
<i>United States v. Quinn</i> , 8 Blatch., 48, 67	9
<i>United States v. Schooner Peggy</i> , 1 Cranch, 103	15, 17
<i>Wade v. St. Mary's School</i> , 43 Md., 178	19
<i>Walden v. Holman</i> , 2 Ld. Raym, 1015	11
<i>Walston v. Com.</i> , 16 B. Mon. 15	23
<i>Wayne Co. v. St. Louis, etc., Railroad</i> , 66 Mo., 77	18
<i>West v. Gammon</i> , 98 Fed., 426	7, 12

Statutes and Miscellaneous References.

Revised Statutes:

Section 688	36
725	37
823	35
1014	37, 38
1024	2, 5, 6, 15, 28, 33, 34, 35, 37
1025	26
1026	3, 5, 8, 9, 14
1032	13
1033	40
1042	38
1891	28, 33
5209	1, 33
5339	34

VII

	Page.
10 Stat., 161; 670	34, 35
17 Stat., 158	9
23 Stat., 53, secs. 7, 9	28
26 Stat., 826	36
30 Stat., 1253; 1294, 1295	3, 27, 28
31 Stat., 321	14
34 Stat., 1246	36
37 Stat., 512	5
Alaska Code of Criminal Procedure	2, 3
Archbold, Cr. Pl. (24th ed., 1910), 174	8
Beale's Cr. Pl. & Pr., sec. 60, p. 53	8
2 Bishop, New Cr. Proc. (2d ed.), secs. 782, 784	8
Carter's Alaska Codes	28
Code of Criminal Procedure, sec. 10	37
Cong. Globe, 42d Cong., 2d sess., pt. 1, p. 726	10
Cooley Const. Lim. (7th ed.), 326	21
2 Hale, P. C., 257; 315	8, 13
2 Hawkins, P. C., c. 31, secs. 5, 7	8
Keigwin's Precedents of Pl., p. 348	11
Penal Code of 1899, sec. 218	14
7 Wentworth, 347	11
Wharton, Cr. Pl. and Pr. (9th ed.), secs. 404, 405	8

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

C. M. SUMMERS, PETITIONER,	} No. 502.
v.	
UNITED STATES OF AMERICA, RESPONDENT.	

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This writ of certiorari was granted to review the judgment of the Court of Appeals for the Ninth Circuit affirming a sentence of the District Court for Alaska of five years' imprisonment for violation of section 5209, Revised Statutes, a part of the national banking law. The sentence was entered on overruling the demurrer to the indictment, petitioner declining to plead over, but electing to stand on his demurrer.

Petitioner was president of a national bank at Juneau. As frequently happens when a bank officer misappropriates funds, it became necessary to make false entries in the books of the bank as well as in its reports to the comptroller. According to the indictment petitioner abstracted some \$33,000 of the bank's

funds (Rec. 129) and the false entries made to hide the abstractions covered several years.

As is usual in such prosecutions, the indictment contained many counts (56 in all), some charging false entries in the books and others in the reports to the comptroller, others charging misapplication of the bank's funds, and still others charging abstraction.

Petitioner filed a demurrer on several grounds, which he submitted without argument, and it was promptly overruled (R. 143); whereupon he pleaded not guilty.

When the case was called for trial, petitioner withdrew his plea and resubmitted his demurrer; the only point argued was misjoinder. The question depended on whether section 1024, R. S., or section 43 of the Alaska Code of Criminal Procedure governed.

Said section 1024 reads:

When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

Said section 43 provides:

That the indictment must charge but one crime, and in one form only.

The District Court held that section 43 applied only to crimes defined in the Alaska Penal Code, and that section 1024 applied to Federal offenses; and again overruled the demurrer (R. 163)

The court's opinion is attached as Appendix A to petitioner's brief in this court. An earlier opinion of the same judge on the same question in one of the so-called Transportation cases, the indictment in one of which was before this court in *United States v. Pacific & Arctic Co.* (228 U. S. 87), is annexed to this brief as Appendix I.

After moving for a continuance, petitioner on May 20 filed a formal election to stand on his demurrer and a request for sentence under section 97 of the Alaska Code of Criminal Procedure, which provided that if demurrer be disallowed, "the court must permit the defendant, at his election, to plead * * * but if he does not plead, judgment must be given against him." (30 Stat. 1295.)

To the "complete surprise" of petitioner (see his affidavit, Rec. 167), the United States attorney contended that section 97 was inapplicable, and that the case was governed by section 1026, Revised Statutes of the United States, which provides that when demurrer to an indictment is overruled, "the judgment shall be respondeat ouster; and thereupon a trial * * * or a continuance may be ordered, as justice may require."

After elaborate argument, and repeated assertions by petitioner of his right and desire to stand on his demurrer and have sentence imposed, the court ruled

that the Revised Statutes governed, but that the petitioner might waive his right to trial under section 1026, Revised Statutes, and have judgment entered on his demurrer; whereupon he solemnly elected to stand on his demurrer, and have judgment entered against him (R. 181). Thereafter, when asked whether he had anything to say why sentence should not be pronounced against him, not having yet repented of his election, he replied that he had nothing to say "except that he desired to test his demurrer upon appeal" (R. 184).

On the same day petitioner having obtained a writ of error to the Court of Appeals, filed his assignment of errors, which will be examined in vain for the slightest evidence that he intended to assert that he could not lawfully stand on his demurrer.

When the case was argued in the Court of Appeals in the following October, petitioner, while apparently still confident that his demurrer would be held good—so confident in fact that he devoted 74 pages, or practically all of a lengthy brief to expounding his argument—suggested, but so delicately as not to weaken his argument on his original proposition, that the effect of the sentence imposed at his urgent solicitation was to deprive him of his right to trial by jury, a right which he could not waive. The point was however fully discussed in the oral argument and in the motion for rehearing.

But after the affirmance by the Court of Appeals of his sentence, this deprivation of a jury trial has be-

come so important that his arguments on it fill a large part of his several briefs filed in this court.

By act of August 24, 1912 (37 Stat., 512), a legislature was established for the Territory of Alaska, and this legislature, meeting in March, 1913, adopted on April 26, 1913, an act (given in full as Appendix II hereto) amending said section 43 of the Code of Criminal Procedure to correspond precisely with section 1024, Revised Statutes, so that if the demurrer were now to be heard for the first time it would necessarily be overruled.

BRIEF OF ARGUMENT.

I. Petitioner was deprived of no constitutional or statutory right to trial by jury.

A. The right to trial guaranteed by the Constitution is the right as it existed at common law; at common law judgment on overruling demurrer to an indictment was final, and accused had no right to plead over.

B. Section 1026, R. S., modifies the common law by giving petitioner the option to plead over or to accept judgment on demurrer; his election as made in this case is binding on him.

II. This court will decide this case on the present law: Section 43 Criminal Procedure Code having been amended to correspond to section 1024, R. S., the question of misjoinder is immaterial.

The amendment is not *ex post facto*.

III. The joinder was immaterial because:

(a) Petitioner received minimum sentence for one offense;

(b) Any error might have been cured had petitioner gone to trial;

(c) Any error was one of form cured by section 1025, R. S.

IV. The practice in this case is governed by section 1024, R. S., and the offenses were properly joined under that statute.

ARGUMENT.

I.

Petitioner has not been deprived of any constitutional or statutory right to trial by jury.

The action which petitioner complains of on this point was induced by his own urgent arguments, the trial court holding that petitioner was entitled to trial, but that under *Diaz v. United States*, 223 U. S., 442, 454, he might waive that right and receive sentence on his demurrer. Petitioner did not assign this ruling as error. It is difficult to believe that his counsel thought of the point and endeavored to entrap the trial court. On the contrary, the point was no doubt evolved as a last resort in the Court of Appeals. That court effectually disposed of it in its opinion on the motion for rehearing (R., 220).

A. The Constitution conferred no right to trial by jury on the pleadings in this case.

1. The right to trial by jury is the right as it existed at common law.

This proposition laid down in practically every case which has been decided under Art. III, Sec. 2, and the Sixth Amendment of the Constitution, requires no discussion for its maintenance at this late date. *Thompson v. Utah*, 170 U. S., 343, 349; *Callan v. Wilson*, 127 U. S., 540, 549; *Schick v. United States*, 195 U. S., 65, 69; *West v. Gammon* (C. C. A. 6th C.), 98 Fed., 426.

If this be the rule, it must of course work both ways; and if in a certain instance the common law did not require a jury trial there is nothing in the Constitution which demands it. *Schick v. United States*, *supra* (a written waiver of the trial by jury of a "petty offense" triable by the court at common law held not to violate the Constitution); *West v. Gammon*, *supra* (the plea of guilty, upon which at common law the court might enter judgment without trial, held not to require a jury trial under the Constitution); *United States v. Lair* (C. C. A. 8th C.), 195 Fed., 47, 52 (so held as to plea of *nolo contendere*); cf. *Hallinger v. Davis*, 146 U. S., 314, 318; *Craig v. State*, 49 Oh. St., 415; *People v. Chew Lan Ong*, 141 Cal., 550; *State v. Almy*, 67 N. H., 274 (statutes authorizing court, on plea of guilty of murder, to determine degree of offense, held not to violate 14th Amendment or State constitution).

2. At common law when a demurrer to an indictment, whether for misdemeanor or felony, was overruled, the defendant had no right to plead over, but the court entered judgment and imposed sen-

tence; however, in some cases the court in its discretion permitted the demurrer to be withdrawn and a plea to be entered.

2 Hawkins P. C. c. 31, secs. 5, 7.

2 Hale P. C., 257.

Archbold, Cr. Pl. (24th ed., 1910), 174.

Wharton, Cr. Pl. and Pr. (9th ed.), secs. 404, 405.

2 Bishop, New Cr. Proc. (2d ed.), secs. 782, 784.

Beale's Cr. Pl. & Pr., sec. 60, p. 53.

Reg. v. Hendy, 4 Cox C. C., 243.

Reg. v. Faderman, 4 Cox C. C., 359, 370.

State v. Norton, 89 Maine, 290.

State v. Passaic Co. Ag. Society, 54 N. J. L., 260.

People v. Taylor, 3 Denio, 91.

In *Reg. v. Faderman*, *supra* (decided in 1852), the question was elaborately argued, and the court, in a lengthy opinion, held that the law gave the prisoner no right to answer over, but that the judgment on demurrer was final even in the case of felonies punishable by death (381-385).

There was, therefore, in this case no issue for the jury to try, and consequently no invasion of petitioner's constitutional right to trial by jury.

B. *All statutory rights were fully accorded petitioner.*

1. Section 1026 gave the right, but did not impose the necessity, of trial by jury.

Inasmuch as no constitutional right of petitioner was infringed, the only question is whether the statute gave him any right which was denied by the courts below.

He relies strongly on section 1026, R. S., which reads:

In every case in any court of the United States where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require.

Undoubtedly this statute gave him a *right* to a trial after his demurrer was overruled, but this trial was the last thing he wanted; he contended below that the statute gave him an option, and he finally prevailed upon the court to permit him to decline the trial and receive judgment on demurrer.

The real question then is the proper construction of section 1026.

This section is in the exact language of an act adopted May 23, 1872 (17 Stat., 158). From the authorities just cited, especially *Reg. v. Faderman*, where the harsh common-law rule was enforced in England as late as 1852, and bearing in mind Federal decisions such as *United States v. Quinn*, 8 Blatch., 48, 67 (decided in 1870), where sentence was imposed on demurrer, it is only reasonable to suppose that this statute was intended to modify the common-law rule and to give to every defendant, *as a matter of right*, an opportunity to defend on the facts after an indictment against him had been held good on demurrer. But Congress did not intend to make neces-

sary a jury trial, if a defendant preferred to receive sentence on demurrer, either because he had no defense on the facts, or was content to rely on questions of law on appeal.

The correctness of this construction appears from the discussion in the Senate:

MR. TRUMBULL. The object of the bill is simply to prevent a final judgment being entered up where a party demurs to an indictment, or some of the counts of the indictment, without allowing the case to go to trial. It was brought to the notice of the committee that there were cases where the court, if a demurrer was interposed to an indictment, entered up final judgment *without giving the party an opportunity to plead and go to trial.* (Italics ours.)

MR. WRIGHT. Entered up judgment against the defendant?

MR. TRUMBULL. Entered up judgment against the defendant. That is the whole object of the bill. (Cong. Globe, 42d Congress, 2d sess., pt. I, p. 726.)

A consideration of the language "the judgment shall be respondeat ouster" leads to the same conclusion.

Originally this judgment was entered upon sustaining plaintiff's demurrer to defendant's plea in abatement, and later was accepted as the proper judgment on any demurrer when the party was to have another opportunity to plead. But it was always understood as conferring an option which he might refuse to

accept, in which event he was said to elect to stand on his demurrer or plea, as the case might be, and final judgment went against him, not on default, but on his pleading, which might be reviewed on error. The judgment that he plead over was never understood as exerting a compulsion, but as conferring a privilege.

This appears from the forms of such judgments, both ancient and modern.

In *Walden v. Holman*, 2 Ld. Raym, 1015, the judgment was "let the defendant answer over."

In 7 Wentworth 347, the language is "that the defendant have another day to plead."

Keigwin's *Precedents of Pl.*, p. 348, shows the modern form of this judgment as concluding "with leave to the defendant to plead over as he may be advised."

Finally, such a construction would deprive a defendant of a right which he enjoyed under the common law at the adoption of the Constitution, and might prove a great hardship on him. Frequently the accused is unable to dispute the facts, though unwilling to admit them, and his only defense is that those facts do not constitute a crime. At common law he might demur and review an adverse decision by writ of error. Under petitioner's construction he is deprived of this right, but must go through a trial, perhaps at great cost of time and money both to himself and the public, before he is entitled to appeal, and this irrespective of the gravity of the crime.

Such a ruling is unnecessary to correct the evil intended to be reached by the statute.

The evil was that no defendant had the *right* to plead over after adverse decision on his demurrer; when this rule is changed by giving him the option to defend on the facts, or stand on his demurrer, the evil has been entirely corrected. A defendant may then defend both on the law or facts, or admit the facts and rely entirely on the law.

This view is in accord with the reasoning of the Court of Appeals for the Sixth Circuit in *West v. Gammon*, 98 Fed., 426, decided by Circuit Judges Lurton, Day, and Taft. There it was contended that a person could not plead guilty. The court said such a contention would require a holding that—

The Constitution not only preserved to the accused the right to enjoy a trial by jury in cases where he had seen fit to make an issue by pleading not guilty, but required him in all cases to submit the question of his guilt to a jury, whether an issue had been made in the case or not. * * * . It was the purpose of the Constitution to preserve to the accused the right, not the necessity, of a trial by jury.

So it was the purpose of the act here under consideration to give to the accused the right but not the necessity of pleading over.

The practice followed in the case was in strict accordance with the petitioner's right. The judgment overruled the demurrer without more. (R. 163.)

It was not necessary that it in terms direct the defendant to plead over, for both before and after the entry of this order he indicated that he would not plead over, making formal judgment to that effect unnecessary.

Smith v. Harris, 12 Ill., 462, 466.

Section 1032, R. S., is not applicable to this case. That section provides:

When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto.

This section is taken from the judiciary act of 1790 and was designed to deal only with the situation where a person when arraigned refused to demur or enter any plea, or in other words stood mute. If this statute had covered the case of an overruled demurrer, there would have been no need for the act of 1872, now section 1026; but as already pointed out, in 1790, under the common law, the prisoner had no right to answer over after demurrer.

This construction is confirmed by the common law definitions of the terms used. In 2 Hale, P. C. 315, it is said, "if a man indicted for felony demurs to the indictment and will not otherwise answer, this is no standing mute, but if the demurrer be ruled against him, he shall have judgment of death."

This statement is quoted with approval in *Reg. v. Faderman, supra*, 4 Cox C. C. 384, where the court explains that "the demurrer was in the nature of a plea."

When the petitioner refused to avail himself of the permission to plead over given by section 1026, that section recognized that the next step, of course, must be to impose final judgment upon the demurrer, and this was done in the present case.

And the final result would be the same if the court were to be relegated either to common law or section 97 of the Alaskan Criminal Procedure Code.

The common law is legislated into Alaska by section 218 of the Penal Code of 1899 and by section 367 of the act of June 6, 1900 (31 Stat., 321).

Under the common law, as shown, a judgment is final when the party stands on his demurrer.

The same judgment would be entered if section 97 of the Alaskan Criminal Procedure Code were held applicable.

The constitutionality of such a statute is sustained in *People v. King*, 28 Calif., 265.

In *re McQuown*, 11 L. R. A., N. S., 1136, 1138, so strongly relied on by petitioner, the statute itself authorized the defendant to stand on his demurrer and receive sentence.

2. Section 1026 did not therefore go to the jurisdiction of the court; it merely invested petitioner with a right which he was free to assert, but which he might waive by his voluntary act. When he declined to proceed to trial and persuaded the court to

impose sentence on the demurrer, he was bound by his election.

Diaz v. United States, 223 U. S., 442, 454.

Schick v. United States, 195 U. S., 72.

Queenan v. United States, 190 U. S., 548, 551.

Rodriguez v. United States, 198 U. S., 156, 164.

Powers v. United States, 223 U. S., 303, 312.

II.

This court will decide the case on the present law; that law authorizes the joinder of several offenses, and the judgment below will not be reversed if upon rehearing the same order must be entered.

In the discussion of this proposition it may be assumed that section 43 of the Alaskan Code governed at the time of trial; but that section has now been amended to accord with section 1024, Revised Statutes, followed by the courts below.

By the great weight of authority an appellate court will decide a matter upon the law in force at the time of its decision; so that an error may become immaterial by reason of a change in the law, and when this happens the appellate court will not reverse particularly when upon the new law the subsequent action of the lower court must be precisely the same as it was originally.

This proposition is supported by several leading decisions of this court.

In *United States v. Schooner Peggy*, 1 Cranch 103, the vessel had been condemned in the lower court and

the case was on appeal to this court, when a treaty with France provided that property captured and not yet definitively condemned should be mutually restored. In holding that the case was to be governed in the Supreme Court by the treaty, Chief Justice Marshall said (p. 109):

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

In *Pugh v. McCormick*, 14 Wall. 361, a promissory note had been improperly received in evidence, because not stamped in accordance with the revenue law; pending the appeal to this court the law was changed so that the action erroneously taken with reference to this note by the collector of internal revenue might thereafter be lawfully had. In affirming the judgment, the court said (p. 373):

* * * still it may be suggested that the ruling in this case was made before the present act was passed, and it must be admitted that the suggestion is correct, but the new act shows to a demonstration that the ruling in question has become immaterial, having ceased to be prejudicial to the defendant, as the collector now possesses the power to do what he then did, that is, to affix the stamps to the note, remit the penalty, and make the proper memorandum of his doings; and it is so clear that

the plaintiff would have a right to require those acts to be done if a new trial were ordered that the court is unhesitatingly of the opinion that the judgment ought not to be reversed for that cause, as the proper stamps were affixed to the instrument and the amount of the required duty was deposited in the treasury before the note was used as evidence.

Where the case is brought here by a writ of error to a State court for reexamination the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted.

In *Dinsmore v. Southern Express Company*, 183 U. S. 115, stockholders sued to restrain the Southern Express Company from purchasing stamps to be placed upon bills of lading under the War Revenue Act of 1898, and to restrain the State Railroad Commission from punishing the company for overcharges in making the shippers pay for the stamps; an injunction was entered in the lower court but dissolved in the Circuit Court of Appeals. Pending the submission of the case to this court, the War Revenue Act was amended by providing that it should not apply to express companies. This court held that the case must be decided upon the new law, quoting with approval the foregoing extract from the Chief Justice's opinion in *United States v. Schooner Peggy*.

This rule has been applied in a variety of cases in the State courts, involving not only matters of practice and procedure, but matters of substantive law.

In *Keller v. The State*, 12 Md. 322, Keller having been convicted of crime and sentenced, the statute was repealed pending his appeal. In reversing the decision the court said (p. 326):

The judgment in a criminal cause can not be considered as final and conclusive to every intent, notwithstanding the removal of the record to a superior court. * * * And so if the law be repealed, pending the appeal or writ of error, the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment.

In *Muskogee National Telephone Co. v. Hall*, 64 S. W. 600, the complainant, having an exclusive franchise to operate a telephone system in the Creek Nation, sought to enjoin Hall from erecting a rival plant. The injunction was denied, and pending the appeal an act of Congress entirely destroyed the exclusive character of complainant's right, and for this reason the erroneous decree was affirmed.

The State decisions following *Pugh v. McCormick*, *supra*, on questions of evidence, are numerous.

See *Hubbard v. Gilpin*, 57 Mo. 441, 444 (ancient document); *Wayne Co. v. St. Louis, etc., Railroad*, 66 Mo., 77 (auditor's certificate); *Myers v. Hollingsworth*, 26 N. J. Law, 186, 191 (where the disqualification of a witness had been removed)

In the latter case the court said (p. 191):

By the act of 1855, the disqualification of the witness on the ground of interest is removed. Hollingsworth would now be a competent witness. If a new trial is granted, the evidence upon which the verdict was rendered, and which now constitutes the ground of complaint, would be clearly admissible. Nothing, therefore, would be gained by setting aside the verdict, except additional costs and delay.

See also *Wade v. St. Mary's School*, 43 Md. 178; *Simpson v. Stoddard*, 173 Mo. 421, 476.

The same principle has been applied to matters of practice.

The case most analogous to the present is *St. Louis, etc., Railway Co. v. Berry*, 93 S. W. 1107; 42 Tex. Civ. Apps. 470. Here two railroads had been erroneously joined as defendants, but pending appeal such joinder was permitted by a new law. In affirming judgment the court said (p. 1108)—

should the judgment rendered be reversed, and the cause remanded for a new trial, on the ground that the court erred in overruling the exception under consideration, appellant will have gained nothing thereby. It is only a question of remedy involved, and under the law as it now exists the joinder of the parties and causes of action would be entirely proper. In such case it has been held that the judgment will not be reversed, although the ruling complained of was error when made.

In *Perry v. Minneapolis Street Railway Co.*, 72 N. W. 55, 69 Minn. 165, defendant demanded a

struck jury, which was denied, and pending appeal the struck jury law was repealed. The court said:

The error, if error it was, in setting aside the struck jury list, was one of those judicial errors which are remediless, and which, in contemplation of law, has done the defendant no injury; certainly none which a new trial would repair.

In *People v. Syracuse*, 128 App. Div. 702, the trial court, on defendant's motion changed the place of trial from Albany County to Onondaga County, in which Syracuse is situated, and pending the appeal the statute provided that an action against a municipal corporation should be tried in the county of its location. In affirming the order, the court said:

It would be an idle ceremony to reverse this order with leave to renew, for the reason that when it should be renewed the special term would have to give effect to the amendment, which would result in making the same order as that appealed from. (704.)

So that the question having become in reality a moot one, the court will not reverse even though of the opinion that the ruling below was erroneous; for petitioner can gain no right or advantage which was not accorded him below.

Petitioner may urge that had it not been for section 43 he would not have relied on his demurrer, but would have accepted his trial, and that this option will be denied him by an affirmance. It is true that in many of the foregoing cases a trial actually

occurred, and that here the petitioner steadfastly refused to go to trial.

But there is no distinction in principle between those cases and the present. Petitioner was offered his trial; the Government had brought witnesses from many parts of the United States and insisted upon trial; if petitioner desired a trial, he should have proceeded in the orderly course, noted his exception to the order overruling the demurrer, and included it in his bill of exceptions, if convicted. When he refused a trial and staked all on the question of pleading he ran the risk of statutes rendering that immaterial, and is in no different position than if he had gone to trial and been convicted on all counts.

As said by this court in *Royal Ins. Co. v. Miller*, 199 U. S. 353, 369, petitioner could not neglect to make full defense, and speculate on a reversal because of an error of law which in a legal sense occasioned no possible prejudice.

Nor can there be any claim that the amended statute is *ex post facto* as applied to offenses committed before its passage. It is a mere change in the rules of procedure, which dispenses with none "of the substantial protections with which the law surrounds the accused." *Cooley*, Const. Lim. (7th Ed.) 326; *Mallett v. North Carolina*, 181 U. S. 589; *Duncan v. Missouri*, 152 U. S. 377; *Hopt v. Utah*, 110 U. S. 57; *Gibson v. Mississippi*, 162 U. S. 565, 590; *Thompson v. Missouri*, 171 U. S. 380, 386. A change in existing law more strictly procedural than

this can not well be imagined. The question whether a defendant shall be tried under an indictment containing fifty-six counts or under fifty-six indictments containing one count each, is certainly not one which goes to the substantial rights of the accused. Regulations of this sort, as was said in *Hopt v. Utah*, *supra*, at 590,

relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure.

In several of the cases above cited the law upheld as not *ex post facto* tended much more strongly to the actual detriment of the defendant than does the statute here. In *Mallett v. North Carolina*, the plaintiff in error was indicted and tried for conspiracy, convicted, and sentenced to imprisonment. He appealed to the Superior Court, which reversed the judgment and granted a new trial. Pending this appeal, a statute was passed giving the State the right of appeal in criminal cases. Under that statute the State appealed from the judgment of the Superior Court to the State Supreme Court, which reversed the judgment of the Superior Court and remanded the cause. Upon writ of error this court held that the statute conferring upon the State the right of appeal was not *ex post facto*.

In *Hopt v. Utah*, the statute in question, enacted after the commission of the offense, made persons convicted of a felony eligible as witnesses. A witness in behalf of the prosecution, whose testimony

tended to implicate the defendant in the crime charged, was serving sentence at the time under a conviction of murder. *Held*, the statute was not *ex post facto*.

In *Hallock v. United States* (C. C. A., 8th Cir.), 185 Fed., 417, the Federal statute (sec. 808, R. S.) fixing the number of the grand jury at from 16 to 23, and requiring the concurrence of 12 grand jurors to find an indictment superseded the territorial law, calling for from 12 to 16 grand jurors and requiring 12 to concur in an indictment, when Oklahoma became a State. The offense was committed before and the indictment found after statehood. *Held*, the Federal act was not *ex post facto*—despite the fact that the indictment was found by a grand jury of 19 members, and was therefore presumably obtained by a smaller majority than would have been requisite under the territorial law.

The State courts have been equally reluctant to declare a change in criminal procedure *ex post facto* because of some possible detriment to the defendant incidental thereto.

Thus, statutes conferring on the prosecution the right of peremptory challenge (*Walston v. Com.*, 16 B. Mon. 15; *State v. Ryan*, 13 Minn. 370, 376), or increasing the number of its peremptory challenges (*State v. Hoyt*, 47 Conn. 518, 531), or reducing the number allowed the prisoner (*South v. State*, 86 Ala. 617; *Mathis v. State*, 31 Fla. 291; *Hallock v. United States*, *supra*), have been universally upheld against the constitutional objection.

In *Com v. Brown*, 121 Mass. 69, 78, the court sustained an act of legislature, passed after the commission of the offense and the impanelling of the grand jury though before the return of the indictment, which provided that said jury should be deemed the lawful grand jury of the county notwithstanding irregularities in its drawing or impanelling or in the writ of *venire facias*. See also *State v. Pell*, 140 Ia. 655. Regarding the Alaska Code amendment as curative in the present case, the direct bearing of this decision becomes obvious.

In *Marion v. State*, 20 Neb. 233, a statute making the court the judge of the law in criminal cases—a function of the jury at the date of the offense—was held not to be *ex post facto*.

The resemblance between the Nebraska case and the present one is striking. In both instances a guilty man would probably consider the old law more advantageous than the new. He might well prefer the sympathies of the jury to the learning of the court, or successive prosecutions to one trial at which his complete wrong-doing would be in evidence. An innocent defendant, however, would have nothing to lose and everything to gain by having the court decide the law of his case, or by standing trial on a multitude of charges at once instead of *seriatim*.

The purpose of the *ex post facto* provision, we submit, is not to obstruct justice by shielding the guilty from the prescribed consequences of their acts. For this reason, procedural changes which facilitate the discovery of the truth by means of a fair and impartial

trial, although they thereby make the offender's conviction more probable, are rightly regarded as valid. The Alaska Code amendment clearly belongs within this class.

It follows that if the present judgment is reversed and the cause remanded, further proceedings will be controlled by the amended statute; and under that statute, the existing indictment is valid in all respects. The only result of the reversal will therefore be that petitioner will be retried under the present indictment or under a new indictment identical in form. If the trial court erred, its error has thus become quite immaterial. Under these circumstances, this court will not reverse merely to decide the interesting but now wholly academic question of law propounded by petitioner. *Mills v. Green*, 159 U. S. 651, 653.

III.

The alleged error was immaterial.

(a) Petitioner received no greater sentence than must have been imposed on a conviction of one crime only.

The ultimate object of section 43 is to prevent the sentence of a defendant for more than one crime in one prosecution. That object has been accomplished here. The minimum sentence under section 5209 is five years; while petitioner has been sentenced on each count, the sentences run concurrently, so that he will not serve a day's imprisonment in excess of the penalty for one offense. The principle that one good count will support a judgment (*Claassen v. U. S.*, 142 U. S., 140) is applicable.

(b) Prejudice can not be shown because the error might have been cured had petitioner gone to trial.

The error might have been cured (1) by verdict of not guilty, or (2) by verdict of guilty on but one count and not guilty on the others, or (3) the prosecution might have dismissed all other counts or the court might have compelled an election.

Of course, if the petitioner had been acquitted on all counts there would have been nothing to appeal from.

So where there is a misjoinder of counts in an indictment and a conviction on one only, the error is immaterial.

Myers v. State, 92 Ind. 390, 394.

Com. v. Packard, 5 Gray, 101.

Com. v. Adams, 127 Mass. 15.

Again, the prosecuting attorney might have decided before verdict to dismiss all except one count, or he might have been compelled by the court to make his election (*Pointer v. United States*, 151 U. S. 396), in which event those counts would have been withdrawn from the indictment as absolutely as if they had been quashed.

State v. Buck, 59 Ia. 382.

Mills v. State, 52 Ind. 187.

It might be argued that petitioner would have been prejudiced by the receipt of evidence on all the counts, but evidence of all of these similar and connected crimes would have been receivable even though but one of the offenses had been charged in the indictment.

(c) The error was one of form cured by section 1025, R. S.

That section provides:

No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

Since section 1025 applies in terms to "any district or circuit or other court of the United States," the Alaska court is such a court. Section 50 of the Alaska Procedure Code is in substance the same..

The joinder of five counts in an indictment drawn under a statute which authorized only three is not ground for demurrer, being under section 1025 a matter of form only. (*United States v. Nye* (C. C. Ohio), 4 Fed., 888; see also *United States v. Durland* (D. C. Pa.), 65 Fed., 408, 413.) Since under section 90 of the Alaskan Code the fact that "more than one crime is charged in the indictment" is made ground for demurrer (30 Stat., 1294), it might be difficult to justify the trial court's ruling on the authority of the *Nye* case. It does not follow, however, that if that ruling was erroneous the error was not merely a matter of form. In *Connors v. United States* (158 U. S., 408), at page 411, it is said that if the objection to the alleged misjoinder of offenses had been made by demurrer and overruled it would not avail on writ of error unless the substantial rights of the defendant appeared to be prejudiced thereby.

IV.

The practice in this case is governed by section 1024, Revised Statutes of the United States, and not by section 43 of the Alaska Code.

1. THE PENAL AND CRIMINAL PROCEDURE CODES OF ALASKA APPLY ONLY TO THE CRIMES THEREIN MENTIONED, AND NOT TO CRIMES DEFINED IN THE REVISED STATUTES OR OTHER GENERAL LAWS OF THE UNITED STATES.

These two codes are contained in the act of March 3, 1899 (30 Stats., 1253). Prior to its adoption, the laws defining crimes in Alaska and regulating their punishment were to be found, first, in the laws of the United States not locally inapplicable (sec. 1891, Revised Statutes), and, second, in the laws of Oregon in force in 1884 so far as they were applicable and not in conflict with the laws of the United States (act of May 17, 1884, 23 Stat., 53, secs. 7, 9; *Kie v. U. S.*, 27 Fed., 351).

As said by the late Senator Carter (Introduction to Carter's Alaska Codes, p. xvii):

Inasmuch as the laws of Oregon had not been compiled for many years prior to 1884, it was something of a task to determine what the law of that State was on the day the act of Congress was approved, and a task more difficult still to ascertain with precision how far a given law of the State was applicable to the unique Alaskan conditions and not in conflict with any law of the United States. The resulting doubts embarrassed the courts and the bar and sorely perplexed the people.

The object of the act of 1899 was to codify those Oregon statutes which Congress deemed applicable to Alaska.

The codes were mainly copied from the statutes of the State of Oregon. (Ibid., p. xviii.)

The act was not intended to define *all* crimes against the United States, including those acts which would be criminal against the United States wherever committed, or Federal offenses, but only those acts which were crimes against the United States because committed in territory under the exclusive jurisdiction of the United States. This is not denied by petitioner. He is willing to admit that Title I of the act (the Penal Code) defines only local or territorial crimes; but he contends that Title II (the Criminal Procedure Code) applies to all crimes in Alaska, both those defined in the penal code and in the general laws of the United States.

We contend, on the contrary, that the two codes are coextensive, and that the provisions of the procedure code relate only to those offenses defined in the penal code.

A brief examination of the act itself demonstrates the correctness of our position.

The two codes are contained in a single statute, the enacting clause of which is—

That the penal and criminal laws of the United States of America *and the procedure thereunder* relating to the District of Alaska shall be as follows.

Title I, in section 2, declares—

That crimes and offenses defined in this act committed within the District of Alaska shall be punished as herein provided.

In some 219 sections Title I then defines the usual offenses against the person, property, peace, justice, etc., and fixes the punishment therefor.

Title II (the Code of Criminal Procedure) declares in section 1:

That proceedings for the punishment and prevention of the *crimes defined in Title I of this act* shall be conducted in the manner herein provided.

Then follow some 481 sections in 44 chapters relating to the venue, the grand jury (ch. 4), their powers and duties (ch. 5), and so on through appeal; and an appendix contains short forms of indictments, all for local crimes.

Clearly, the two titles are interdependent, and the procedure elaborately set forth in the second relates only to the crimes defined in the first, and is that same procedure mentioned under Title I and referred to in the enacting clause.

The only section in Title II applying to offenses other than those defined in Title I is section 10, which expressly gives the grand jury the power to indict for all crimes, Federal as well as local, committed in Alaska. That section provides:

That grand juries, to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected

and summoned, and their proceedings shall be conducted, in the matter prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well as those that are designated in title one of this act as those that are defined in other laws of the United States.

This provision strengthens our argument that the two titles are otherwise coextensive; for, had Congress intended the procedure code to apply to all offenses this express enactment would have been unnecessary.

The reason for this provision is found in the fact that the Oregon law provided for a grand jury of seven, while the Federal law prescribed from sixteen to twenty-three members, and there had been a difference of opinion among the Alaska judges as to which law applied to local offenses, some of the judges calling two grand juries—one for local and the other for Federal crimes. The purpose of this section was evidently to put that point at rest.

Petitioner relies on the last phrase of section 13. That section is:

That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment, *as provided in this act.*

The jury make a "presentment" to the court of certain facts found to exist when they desire to ask the instruction of the court concerning the law arising thereon (secs. 15, 35); they present by "indictment," of course, when they have reached a conclusion on both the facts and law (sec. 29).

The phrase "as provided in this act" may apply to one or both of the preceding clauses. It may relate to the power and duty of the grand jury to *inquire* into all crimes within the jurisdiction of the court, or it may relate to their duty to *present* those crimes either by presentment or indictment. In either event the phrase is immaterial here. In the first case the jurisdiction of the grand jury to inquire is provided in section 10 of the act, and in the second case, their duty to present, and whether they shall present by presentment or by indictment, is provided in chapters 4 and 5.

In all probability the true construction of section 13 is that the concluding phrase modifies both the power and duty to inquire as well as to present.

But by no reasonable construction can it be said to modify the rules of pleading governing the form of their indictment after they have exercised their power to inquire, and have determined to present by indictment. When they have done that section 13 has been exhausted.

The contention of petitioner that section 43 and the entire procedure code apply to all crimes committed in Alaska goes too far. If the procedure code applies to *all* crimes in Alaska, by the same logic

Title I defines *all* crimes in Alaska. This is clearly not so. Not only does said section 10 of Title II recognize the contrary, but Title I contains no reference to numerous crimes defined in Title LXX of the Revised Statutes, such as crimes against the existence and operations of the Government (chs. 2, 5); against the civil rights of citizens (ch. 7); against the neutrality laws (Title LXXVII, Revised Statutes); nor to the numerous other provisions of the Revised Statutes not included in the Title Crimes, as, for example, section 5209, R. S., involved here. It will not be contended that Congress intended to abolish these offenses so far as Alaska is concerned.

2. THE GENERAL LAWS OF THE UNITED STATES NOT
LOCALLY INAPPLICABLE, INCLUDING SEC. 1024, R. S.,
ARE IN FORCE IN ALASKA.

(a) Section 1891, Revised Statutes of the United States, provides:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Alaska became an organized Territory by the act of May 17, 1884, and said section 1891 therefore applies to it.

Interstate Commerce Com v. Humboldt S. S. Co., 224 U. S. 474, 481.

Nagle v. United States, 191 Fed. 141.

The act of May 17, 1884, established a District Court for the District of Alaska, "with the civil and criminal jurisdiction of district courts of the United States" as well as of the circuit courts (sec. 3), and declared that the general laws of Oregon then in force should be the law in said district "so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States" (sec. 7) and that "the laws of the United States not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto" (sec. 9).

In *Kie v. United States*, 27 Fed., 351, decided in 1886 by the Circuit Court of Oregon upon an appeal from the District Court of Alaska, it was held by Judge Deady that a prosecution for homicide committed in Alaska must be under the laws of the United States, and not under the Oregon Code.

This decision has since been accepted as establishing the rule in Alaska that the laws of the United States are first to be looked to, and only when they are silent does the Oregon law apply.

This rule was inferentially recognized by this court in *Fitzpatrick v. United States*, 178 U. S., 304, where a conviction of murder under section 5339, R. S., was affirmed. The Federal law did not define murder, and it was held that the definition of the crime was to follow the Oregon law, and not the common law.

(b) *Section 1024 is locally applicable to Alaska.*

Section 1024 was originally contained in the act of February 26, 1853 (10 Stat. 161), to regulate the fees

of the clerks, marshals, and attorneys of the courts of the United States; the appropriation act of March 3, 1855 (10 Stat. 670), extended its provisions to certain territories; and this act was codified in section 823 Revised Statutes, as making the fee bill applicable to all the States and Territories.

The act of May 17, 1884, declares that the civil officers, including the attorney, marshal, and clerk shall receive the fees of office established by law as determined and allowed in respect of fees of similar offices under the laws of the United States, which fees shall be deposited in the Treasury of the United States; and that each of the officers shall be paid a certain fixed salary (Sec. 9).

The purpose of the original act of 1853 was to prevent the officers of the United States from increasing their fees by filing separate indictments when the offenses might properly be joined in one indictment. This fee bill was applied to Alaska, and therefore the same reasons exist for enforcing section 1024 in Alaska as elsewhere in the United States.

Again, section 1024 as embodied in the Revised Statutes applies to all courts of the United States.

It is placed in the judiciary title under the head of criminal procedure and among sections which in terms apply to *all* United States courts.

The character of the district court for Alaska has been many times considered by this court, and the effect of those decisions seems to be that whenever it is exercising the jurisdiction of a district court of the United States the Federal rules apply.

It is a Territorial court (*McAllister v. United States*, 141 U. S., 174), and is not a district court within sections 4, 5, and 6 of the circuit court of appeals act of March 3, 1891 (26 Stat., 826), but the supreme court of the Territory of Alaska within section 15 of that act authorizing appeals and writs of error to the circuit court of appeals (*Steamer Coquitlam v. United States*, 163 U. S., 346); but it is a district court of the United States within the meaning of section 688, Revised Statutes, authorizing this court to issue a writ of prohibition to the district courts when proceeding as courts of admiralty (*In re Cooper*, 138 U. S., 404; 143 U. S., 494) and a district court of the United States for purposes of appeal (*In re Cooper*, 143 U. S., 472, 510).

In *United States v. Pacific & Arctic Co.* (228 U. S., 87), defendants moved to dismiss a writ of error brought by the United States to review a judgment of the District Court of Alaska sustaining a demurrer to the indictment found under the Sherman and interstate commerce laws. The writ was brought under the so-called criminal appeals act of March 2, 1907 (34 Stat., 1246), which authorized a writ of error "from the district or circuit courts." This court overruled a motion to dismiss, necessarily holding that the District Court of Alaska was such a district court.

See also—

Embry v. Palmer (107 U. S., 3, 9), (the Supreme Court of the District of Columbia is a court of the United States).

Benson v. Henkel (198 U. S., 1, 13) and

Hyde v. Shine (199 U. S. 62, 75) (the District of Columbia is a district of the United States within section 1014, Revised Statutes, authorizing the removal from one district to another of persons charged with crime).

United States v. Haskins (3 Sawyer, 262) (the District Court for the Territory of Utah is a court of the United States within the same section).

Moss v. United States (23 App. Cas., D. C., 475) (the courts of the District of Columbia are United States courts within section 725, Revised Statutes, relating to contempts).

In the present case the District Court of Alaska exercised the jurisdiction of a district court of the United States. Section 1024 is a part of the machinery provided by Congress for the government of district courts, and therefore applies here.

3. A DUAL SYSTEM OF PROCEDURE DOES EXIST IN ALASKA.

To our argument it is objected that there is not a dual procedure in Alaska, and numerous decisions of this court are cited in support of the assertion.

It is not denied that the Alaska court has a dual *jurisdiction*, both Federal and Territorial (*Ex parte Crow Dog*, 109 U. S., 556, 560; sec. 10, Code Crim. Proc.).

Congress did not confer this dual jurisdiction without providing a procedure, and since the code of criminal procedure applies only to the crimes defined in the penal code, it follows that the Federal pro-

cedure necessarily governs prosecutions for Federal offenses. (*United States v. Folsom*, 38 Pac., 70.)

Before considering the cases cited by petitioner, an examination of the code of procedure relied on by him will show a dual practice in many matters.

For instance, chapter 39 authorizes the governor of the Territory to demand the surrender of fugitives from the justice of the Territory, and to surrender those demanded by the governors of the States or other Territories. But there is no provision for surrendering fugitives charged with crimes against the United States. They must be proceeded against under section 1014, R. S., which this court has held applicable to the District of Columbia (*Benson v. Henkel*, 198 U. S., 1, 13) and hence to the Territories.

Again, section 481, where the minimum penalty provided in that act is manifestly too severe, authorizes the court to impose a lesser penalty. This can not, under its very language, apply to Federal crimes.

Section 190 directs that the convict shall work out any fine at the rate of \$2 a day. Under the Federal law, if unable to pay, he may obtain his liberty after serving 30 days. (Sec. 1042, R. S.)

By section 94, a judgment sustaining demurrer to an indictment is a bar to further prosecution unless the court direct the submission of the case to another grand jury. Under section 262, a *nolle prosequi* may not be entered without the permission of the court, and, in case of felony, when entered is an absolute bar to further prosecution.

Chapter 28, in certain cases where the person injured has received satisfaction, authorizes the compromising of the crime.

If a dual practice exists as to these things there can be no objection to other differences in practice as applied to prosecutions for Federal crimes.

But the cases cited by petitioner do not support his contention.

Of course Congress may commit to the Territorial legislature entire jurisdiction over matters of procedure, or may itself establish a different procedure for the Territorial courts. We do not dispute this power of Congress; the only question here is whether Congress intended to establish the same procedure for Federal as for local crimes committed in Alaska.

An examination of the decisions in this court cited by petitioner will show that they all involved local or Territorial matters, whether civil or criminal, and that as to such local matters at least Congress had delegated to the Territorial legislature all matters of procedure.

Clinton v. Englebrecht, 13 Wall., 434 (1871), was a civil suit brought in Utah Territory to recover a penalty for the destruction of plaintiff's property; the question was whether the Federal or local statute governed the selection of jurors. This court held that by the organic act the subject was committed to the Territorial legislature, and that its laws governed.

Hornbuckle v. Toombs, 18 Wall., 648, was a civil action brought in Montana for the diversion of water.

The Territorial legislature had abolished the distinction between law and equity, and provided that there should be but one form of civil action. The court held that this subject had been committed to the legislature, at least so far as Territorial matters were concerned.

The other cases cited by petitioner but apply the principle laid down in these.

Reynolds v. United States (98 U. S., 145) and *Miles v. United States* (103 U. S., 304, 310) were prosecutions, in Utah for bigamy, a local crime. Each involved a question as to the jury, and it was held that the local statute applied.

Good v. Martin (95 U. S., 90) was a suit on a promissory note brought in Colorado. Held, that the Territorial and not the Federal statute governed as to competency of witnesses.

In *Thiede v. Utah* (159 U. S., 510, 514), a prosecution for murder, which was a local or territorial offense, it was held that section 1033, R. S., directing the service of a list of the witnesses and jurors on the defendant in a capital case, was not applicable, but that the practice was regulated by the statutes of the Territory.

These cases are in no way opposed to our argument.

1. In the first place they are all based on the fact that the organic act in each case conferred on the territorial legislature power over the subject matter, and therefore the acts of that legislature governed, at least so far as applied to local matters.

Here there was no legislature in the territory of Alaska, and no delegation to any body to adopt laws

which would supersede those of Congress. For this reason those decisions are inapplicable. The case is governed by *Page v. Burnstine* (102 U. S., 664, 668).

Here Congress passed both laws, and we have already shown that the later law was not intended to be exclusive of the earlier.

As illustrative of the difference between the ordinary territory and Alaska, it will be recalled that in *Thiede v. Utah, supra*, this court held section 1033, R. S., was not in force in that territory, while in *Bird v. United States*, 187 U. S., 118, this court treated that section as being in force in Alaska.

2. In the second place, those decisions are in local or territorial cases and none of them involved a matter of Federal jurisdiction. As said by Justice Bradley in *Hornbuckle v. Toombs*, those decisions do not apply to Federal cases. In that case the court said (p. 656):

It is true that the district courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the circuit and district courts of the United States, is not now the question. * * * Cases arising under the Constitution and laws of the United States

would be composed mostly of * * * prosecutions for crimes against the United States, * * *. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable.

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

JESSE C. ADKINS,

Assistant Attorney General.

JOHN RUSTGARD,

United States Attorney,

First Division of Alaska.

KARL W. KIRCHWEY,

Attorney.

OCTOBER, 1913.

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, DIVISION NO. ONE.

No. 836-B.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE NORTH PACIFIC WHARVES AND TRADING COMPANY,
a corporation, Pacific and Arctic Railway and Navigation
Company, a corporation, The Pacific Coast Company, a
corporation, Pacific Coast Steamship Company, a corpora-
tion, C. E. Wynn Johnson, E. E. Billingham, W. H.
Nansen, Ira Bronson, J. C. Ford, J. W. Smith, C. E.
Houston, A. L. Berdoe, and F. J. Cushing, defendants.

OPINION.

John Rustgard, Esq., United States attorney, counsel for
the Government.

Ira Bronson, Esq., *in propria persona*, Royal A. Gunnison,
Esq., Bogle, Graves, Merritt & Bogle, Shackleford & Bayless,
Farrell, Kane & Stratton, counsel for the defendants.

LYONS, District Judge:

It was agreed between counsel for the defendants and for
the Government in this case, as well as in cause No. 837-B,
*United States of America vs. Pacific and Arctic Railway and
Navigation Company*, a corporation, et al., that the questions
tendered by the motion might be argued and considered by
the court in the same manner as if raised by demurrer. The
court will therefore consider the case as if a demurrer had
been interposed, for in the opinion of the court the questions
presented should be raised by demurrer and not by motion
to quash.

The first serious question raised is: Whether or not the
indictment is vulnerable to the attack made upon it by the

demurrer on account of charging more than one crime. The defendants demurred to the indictment in this and all of the other causes wherein more than one crime is set out in the indictment, and among the grounds assigned in said demurrer is that the indictment charges more than one crime. The defendants rely on section 43 of the Code of Criminal Procedure for the District of Alaska, which provides:

That the indictment must charge but *one* crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative.

The Government contends that the section of the code last cited is not applicable to the prosecution of crimes of the character charged in the indictment, but that the crimes being national in character the procedure with reference to the number of offenses or crimes which may be charged in an indictment is found in section 1024 of the Revised Statutes of the United States, which provides as follows:

When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such case the court may order them to be consolidated.

The question presented is interesting, and the determination of the same is not free from difficulty. To uphold their contention the defendants rely on the peculiar wording of certain sections of the Code of Criminal Procedure for the District of Alaska and also upon the following adjudicated cases:

Hornbuckle vs. Toombs, 85 U. S. 21.
Clinton vs. Englebrecht, 80 U. S. 20.
Good vs. Martin, 95 U. S. 90.
Reynolds vs. United States, 98 U. S. 149.
Miles vs. United States, 103 U. S. 304.
Cochran vs. United States, 147 Fed. 10.
Jackson vs. United States, 102 Fed. 473.
Thiede vs. United States, 159 U. S. 510.
United States vs. Haskell, 169 Fed. 449.
Fitzpatrick vs. United States, 178 U. S. 304.
Welby vs. United States, 76 Pac. 122.

It will be observed, after a careful consideration of the case cited, that *Clinton vs. Englebrecht* and *Hornbuckle vs. Toombs, supra*, are the leading cases cited by the defendants announcing the doctrine that the various Territories created by Congress under the Constitution and to whom Congress has delegated the power to legislate for themselves have been empowered under the organic acts creating them to legislate on all matters of local concern not inconsistent with the Constitution of the United States and the organic acts creating such Territories. It will also be observed that all the organic acts creating the Territories and empowering them to elect local legislatures to legislate for said Territories contain substantially the same provision as that conferring legislative authority on the Territory of Utah, which is quoted in *Clinton vs. Englebrecht*, 80 U. S., on page 444, as follows:

The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act.

It is apparent from such legislation that Congress intended that the legislatures of the various Territories should be vested with full power to legislate not only concerning legal procedure, both criminal and civil, but also to enact any substantive legislation not inconsistent with the Constitution of the United States and the acts of Congress creating such Territories. The Supreme Court of the United States in the cases of *Clinton vs. Englebrecht* and *Hornbuckle vs. Toombs, supra*, holds that the power granted to the legislatures to legislate for the Territories, and the approval of their legislation by Congress, indicates that it was the intention of Congress to lodge in the local legislatures of the Territories power to legislate concerning all local matters and to approve such legislation when not in conflict with the Constitution of the United States or the organic acts of such Territories. It must therefore be conceded to be the settled law that in a Territory where a legislature has been provided for by act of Congress such legislature has the power to provide for the procedure to govern the trial of all causes without reference to whether or not the same are being conducted under the local laws of the Territory or under

the general laws of the United States. The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law. It must be admitted that Alaska is an organized Territory within the meaning of section 1891 of the Revised Statutes of the United States, which provides:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereafter organized as elsewhere within the United States.

Nagle vs. United States, 191 Fed. 141.

But does it follow because Congress has seen fit to grant to the legislatures of the Territories where legislative assemblies are provided to enact a complete set of laws governing procedure in all cases that it did not intend to extend to Alaska any of the general laws of the United States providing for the procedure in Federal courts? This question must be answered after a careful consideration of the various acts of Congress relating to the organization of the District Court for the District of Alaska and laws of procedure for said District. On May 17, 1884, Congress passed an act entitled "An act providing a civil government for Alaska," 23 Stat. L. 24, c. 53. Section 3 of that act provides, among other things:

That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of District Courts of the United States, and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law.

On June 6, 1900, Congress passed another act entitled "An act making further provision for a civil government for Alaska, and for other purposes." 31 Stat. L. 321, c. 786. The last-mentioned act includes a Political Code, a Code of Civil Procedure, and a Civil Code for the District of Alaska. Section 4 of said Political Code, found on page 132 of Carter's Annotated Alaska Codes, provides, among other things:

There is hereby established a district court for the district, which shall be a court of general jurisdiction

in civil, criminal, equity, and admiralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President.

On March 3, 1909, Congress passed an additional act, entitled "An act to amend section 86 of an act to provide a government for the Territory of Hawaii; to provide for additional judges; and for other purposes," 35 Stat. L. 838, c. 269. Section 4 of the last-mentioned act provides, among other things:

That there is hereby established a district court for the District of Alaska with the jurisdiction of Circuit and District Courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes.

By the act of May 17, 1884, *supra*, the District Court of Alaska is granted dual jurisdiction; that is, the jurisdiction of an ordinary court of record to hear, try, and determine all causes, both civil and criminal, of a local nature, and also the same jurisdiction as a district court of the United States as well as the jurisdiction of a district court of the United States exercising the jurisdiction of a circuit court of the United States. The act of June 6, 1900, *supra*, limited the jurisdiction of the District Court for the District of Alaska to the trial of local causes. *United States vs. Newth*, 149 Fed. 302. But the act of March 3, 1909, *supra*, again conferred such dual jurisdiction upon the District Court for the District of Alaska which was granted to it by the original organic act of May 17, 1884, *supra*. It is obvious, therefore, that from May 17, 1884, until June 6, 1900, the District Court for the District of Alaska was empowered to exercise dual jurisdiction. From June 6, 1900, until March 3, 1909, the jurisdiction of the District Court for the District of Alaska was confined to matters of local concern. But by the passage of the act of Congress of March 3, 1909, the District Court for the District of Alaska was again clothed with dual jurisdiction. It is manifest, therefore, that the District Court for the District of Alaska has now jurisdiction of the violations of all local laws of the District of Alaska as well as the violations of all national laws applicable to the District of Alaska when the same are committed within the Territorial limits of the District or on the high seas.

Section 7 of the act of May 17, 1884, *supra*, provides:

That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.

On March 3, 1899, Congress passed an act entitled "An act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure for said district." 30 Stat. L., 1253. The last-mentioned act contains a Penal Code and a Code of Criminal Procedure. Sections 1, 10, and 13 of the Code of Criminal Procedure, found on pages 45, 46, and 47 of Carter's Annotated Alaska Codes, provide:

SECTION 1. That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided.

SECTION 10. That grand juries, to inquire of the crimes designated in Title One of this act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title One of this act as those that are defined in other laws of the United States.

SECTION 13. That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court, either by presentment or indictment, as provided in this act.

The determination, therefore, of the question now under consideration may be solved by a correct interpretation of the three sections of the Code of Criminal Procedure for the District of Alaska last quoted. The defendants contend that section 13 must control, and that by section 13 it is provided that all presentments or indictments must be in accordance with such Code of Criminal Procedure, and, therefore, must be drawn in accordance with section 43, heretofore quoted, which provides that each indictment must charge but one crime and in one form only. The Govern-

ment contends that section 1 and section 10 must be construed with section 13 in such manner as to give effect to each and all of said sections. By section 1 it is provided that all crimes defined in Title I of the Penal Code for the District of Alaska must be prosecuted in the manner provided in the Code of Criminal Procedure. Applying the maxim "*Expressio unius est exclusio alterius*" to such section—that is, that express mention of anything in a statute implies the exclusion of all other things—forces the conclusion that the prosecution of all other laws not defined in Title I must be prosecuted in accordance with some other procedure. It is impossible to harmonize the letter of the language used in section 10 with section 1 or with any other part of the Code of Criminal Procedure for the District of Alaska, for section 10 provides, among other things:

That grand juries, to inquire of the crimes designated in title one of this act, committed or triable within said district, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts.

It is true that grand juries to inquire of the crimes defined in Title I, *supra*, are selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, but their proceedings are not conducted in the manner prescribed by such laws, for the manner of their proceeding is completely defined and prescribed by the Code of Criminal Procedure itself. What, therefore, is the meaning of and what construction can be given to section 10, *supra*, which will cause it to harmonize with sections 1 and 13 and give effect to all such sections? It is apparent that the framers of section 10 had in mind dual procedure for the District Court for the District of Alaska in the prosecution of crimes, because the Code of Criminal Procedure prescribes a procedure which governs grand juries while they are investigating local or Territorial crimes; but section 10 provides that the grand juries shall be governed by the rules of proceedings prescribed by the laws of the United States with respect to grand juries of the United States District

and Circuit Courts. It is evident, therefore, that it is necessary, in order to arrive at a correct construction of section 10, that the court disregard its letter and give force and effect to its spirit. While its language is confusing and contradicts section 1, as well as other provisions of the Code of Criminal Procedure, when carefully considered in the light of the dual powers of the court, as well as the other sections of the Code of Criminal Procedure, it is reasonably clear that Congress intended by section 10 to provide for two methods of procedure—one to govern the trial of offenses against the general laws of the United States and the other to govern the proceedings in the prosecution of local or Territorial crimes defined in Title I of the act to define and punish crimes in the District of Alaska and to prove a Code of Criminal Procedure in said district. Section 10, therefore, should receive the construction which would be warranted if it contained the following language:

That grand juries, to inquire of the crimes designated in Title One of this act, committed or triable within said district, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts; and grand juries, to inquire of crimes defined in other laws of the United States, committed or triable within said district, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts; the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title One of this act as those that are defined in other laws of the United States.

Such a construction gives effect to the entire section, reconciles it with all other parts of the Code of Criminal Procedure, and harmonizes with all other congressional legislation regarding the organization of the District Court for the District of Alaska, its jurisdiction and procedure.

Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit of reason of the law will prevail

over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely inoperative. So the meaning of general terms may be restrained by the spirit or reason of the statute, and general language may be construed to admit implied exceptions.

36 Cyc. 1108 and 1109, and cases cited; *Holy Trinity Church v. United States*, 143 U. S. 457; *Interstate Drainage & Investment Company v. Board of Commissioners*, 158 Federal, 270.

In the opinion of the last mentioned case, on page 273, the court used the following language:

The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity.

See, also, *Wisconsin Industrial School for Girls vs. Clark County*, 79 N. W. 422; *State vs. Railroad Commission*, 117 N. W. Rep. 846, wherein the court, among other things, said:

The actual judicially determined legislative intent must always govern if expressed at all so as to be discernible by the searchlights which the court possesses. They permit of looking at a written law as a whole, to the subject with which it deals, to the reason and spirit thereof, to give words a broad or narrow construction, going either way to the limits of their reasonable scope, to supply omitted words which are clearly in place by implication, to change one word for another in case of the wrong one being

clearly used, and so read out of the enactment the real intent, even though it may be contrary to the letter thereof. * * * One of the most familiar and safe canons of construction may be stated thus: For the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof—such idea being regarded as such limitation upon particular words or clauses and expansion of others within the scope thereof, in connection with that of words clearly implied—and be thus, if reasonably practicable, brought into harmony with such idea.

Unless section 10 is construed so as to limit the following language:

That their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts.

In its application to the rules of procedure that govern the grand jury while investigating violations of the general laws of the United States, it is meaningless, and contradicts section 1 as well as all other provisions of the Code of Criminal Procedure, for it isn't true that grand juries when investigating crimes defined in Title I, *supra*, follow the procedure governing grand juries of United States courts; but do follow the procedure prescribed by the Code of Criminal Procedure.

We must next consider the true intent and meaning of section 13, bearing in mind that section 10 provides that grand juries inquiring of crimes not defined in Title I, *supra*, shall be governed by the procedure followed by grand juries of the United States District and Circuit Courts. We find that section 13 does not in any manner contradict section 10 when so construed, for it provides:

That the grand jury have power and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court either by presentment or indictment, as provided in this act.

That is, if the grand jury is investigating a local crime, it shall follow the specific provisions of the Code of Criminal Procedure; if it is investigating national crimes, or infractions of laws not defined in Title I, it shall follow the procedure prescribed by the laws of the United States with

respect to grand juries of the United States District and Circuit Courts. Thus, both procedures are provided for by this act; that is, the act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure in said district, by giving section 10 the construction heretofore indicated. The proceedings prescribed by the laws of the United States with respect to grand juries for the United States District and Circuit Courts are a part of the Code of Criminal Procedure, and are made to apply to and govern the grand jury when investigating violations of laws other than those defined in Title I, *supra*; that is, section 10 incorporates in and makes such procedure a part of the act referred to in section 13, and when the grand jury, while inquiring into violations or infractions of the general laws of the United States, follows the Federal procedure it is proceeding according to the requirements of section 13. Nor does such a construction of the three sections in any way bring section 1 in conflict with the other two sections, for section 1 provides for the entire proceeding in the punishment of crimes defined in Title I; not only the proceedings that govern the grand jury, but also the proceedings that govern the trial of such criminal cases, while sections 10 and 13 merely deal with the proceedings of the grand jury.

Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view, therefore, it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible, the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not

be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it can not be invoked where the language of a statute is clear and unambiguous.

36 Cyc. 1147, 1148, 1149, 1150, and cases cited.

In the light of the fact that Congress has seen fit to confer on the District court for the District of Alaska the jurisdiction of a United States District Court and the consequent power to try all cases involving the violation or infraction of the national laws committed within the said district, and in the further light of section 1891 of the Revised Statutes, which extends to all Territories the Constitution and all laws of the United States that are not locally inapplicable, which section has been held to apply to Alaska (*Nagle vs. United States*, 191 Fed. 141), the court should not assume that the provisions of the general statutes of the United States governing the procedure in the Federal courts were not extended to the District of Alaska unless the legislation of Congress makes manifest its intent to extend only the substantive laws of the United States to the district and to withhold the general laws of procedure. It follows, therefore, that section 1024 of the Revised Statutes, *supra*, applies to Alaska and may be followed by the grand jury when considering infractions of laws of the United States not defined in Title I of the act to define and punish crimes within the District of Alaska and to provide a Code of Criminal Procedure for said district.

Since Congress has reserved to itself the exclusive power to legislate for Alaska, has extended to this Territory all the general laws of the United States not locally inapplicable,

and has conferred on this court the jurisdiction of a United States District Court to punish all violations of such laws, what could be its purpose in refusing to extend to this district the laws and rules of procedure of the United States District Courts, which the light of experience has proved to be so adequate and satisfactory in the prosecution of offenses of the character charged in the indictment? Section 1 of the Code of Criminal Procedure, *supra*, clearly implies the existence of other rules of procedure applicable to inquiries concerning crimes not defined in Title I of that act, and the intention of Congress to provide such other rules of procedure to govern the proceedings of the grand jury when inquiring into violations of the general laws of the United States is manifested in section 10 of the same code.

The defendants further contend that section 2 of what is commonly known as the Sherman Act does not apply to Alaska, for it provides:

* * * * *

Given in open court at Juneau, Alaska, on the 29th day of April, 1912.

THOMAS R. LYONS, *Judge*.

APPENDIX II.

CHAPTER 39, SESSION LAWS, 1913.

(H. B. No. 88.)

AN ACT To amend section 43 of Title II of the act of Congress of March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District."

Be it enacted by the Legislature of the Territory of Alaska:

That section 43, of Title II, of the act of Congress approved March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District," be, and is hereby, amended to read as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Approved April 26, 1913.

THE LIBRARY OF THE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.
MAY 8 1912
JAMES H. HARRISON
1912

No. 502

Yield Journal of the United States

CHRONICLED FROM 1912

U. S. DEPARTMENT OF AGRICULTURE

UNITED STATES OF AMERICA

DEPT. OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

SECTION OF THE UNITED STATES TO ADVANCE

U. S. DEPARTMENT OF AGRICULTURE

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

C. M. SUMMERS, PETITIONER,	} No. 1045.
v.	
UNITED STATES OF AMERICA, respondent.	

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.*

MOTION BY THE UNITED STATES TO ADVANCE.

On behalf of the United States the Attorney General moves to advance the above-entitled cause under paragraph 3 of rule 26.

Summers was indicted on January 3, 1912, in the first division of the district of Alaska, for violating the national-bank act. The indictment contained 56 counts, and the question in the case is whether more than one offense may be joined in an indictment in Alaska. Summers demurred on this ground and stood on his demurrer, whereupon sentence of five years' imprisonment was imposed, and this sentence was affirmed by the Circuit Court of Appeals.

The offenses consisted in making false entries in the books of the bank and in reports to the Comptroller of the Currency and in the abstraction and misapplication of the funds of the bank of which Summers was president.

The crimes are charged in the indictment to have occurred in the years 1909, 1910, and 1911. If the demurrer should be sustained, new indictments will be necessary, and they should be filed as quickly as possible in order to avoid the bar of the statute of limitations. For this reason an early decision is important.

Opposing counsel concur in this motion.

JAMES C. McREYNOLDS,

Attorney General.

JESSE C. ADKINS,

Assistant Attorney General.

MAY 1, 1913.

○

SUMMERS *v.* UNITED STATES.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 502. Argued October 22, 23, 1913.—Decided November 10, 1913.

The court will if possible avoid construing a code of procedure as establishing a dual instead of a single procedure in the prosecution of crimes committed within the same territorial jurisdiction.

The fact that the courts of Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as that vested in the circuit and district courts does not make them circuit and district courts of the United States.

The Alaskan Code of Criminal Procedure is very complete and circumstantial. It covers every step in a criminal proceeding including the form of indictment of all crimes whether specifically defined therein or not.

Prior to the amendment of 1913, § 43 of Title II of the Alaskan Code of Criminal Procedure providing that the indictment must charge but one crime and in one form only, applied to the indictment for any offense whether specifically defined in that Code or not.

It is a substantial right, and not a mere matter of procedure, to have the indictment confined to one offense and in one form only; and the amendment of 1913 to such § 43, permitting the joinder of several offenses, did not have retrospective operation.

The principle that one good count will support a judgment of conviction does not apply where the accused has the right to defend against the validity of the indictment for joining the counts and this right has not been lost by failure to plead the defect.

Fault cannot be imputed by the appellate court to the accused for standing on a right under the law as it existed at the time of the trial because the law has been so amended meanwhile as to eliminate such right.

This court, having sustained appellant's contention that the indictment was insufficient, refrains from expressing any opinion on other contentions of appellant.

202 Fed. Rep. 457, reversed.

THE facts, which involve the validity of an indictment

231 U. S.

Argument for the United States.

charging more than one offense, found in Alaska, are stated in the opinion.

Mr. Albert Fink, with whom *Mr. Lewis P. Shackelford*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. Kurnal R. Babbitt* were on the brief, for petitioner.

Mr. Assistant Attorney General Adkins, with whom *Mr. John Rustgard*, United States Attorney and *Mr. Karl W. Kirchwey* were on the brief, for the United States:

Petitioner has not been deprived of any constitutional or statutory right to trial by jury. *Diaz v. United States*, 223 U. S. 442, 454.

The right to trial by jury is the right as it existed at common law. *Thompson v. Utah*, 170 U. S. 343, 349; *Callan v. Wilson*, 127 U. S. 540, 549; *Schick v. United States*, 195 U. S. 65, 69; *West v. Gammon*, 98 Fed. Rep. 426; *United States v. Lair*, 195 Fed. Rep. 47, 52; *Hallinger v. Davis*, 146 U. S. 314, 318; *Craig v. State*, 49 Oh. St. 415; *People v. Chew Lan Ong*, 141 California, 550; *State v. Almy*, 67 N. H. 274.

At common law when a demurrer to an indictment, whether for misdemeanor or felony, was overruled, the defendant had no right to plead over, but the court entered judgment and imposed sentence; however, in some cases the court in its discretion permitted the demurrer to be withdrawn and a plea to be entered. 2 Hawkins P. C., c. 31, §§ 5, 7; 2 Hale P. C. 257; Archbold, Cr. Pl. (24th ed., 1910), 174; Wharton, Cr. Pl. and Pr. (9th ed.), §§ 404, 405; 2 Bishop, New Cr. Proc. (2d ed.), §§ 782, 784; Beale's Cr. Pl. & Pr., § 60, p. 53; *Reg. v. Hendy*, 4 Cox C. C. 243; *Reg. v. Faderman*, 4 Cox C. C. 359, 370; *State v. Norton*, 89 Maine, 290; *State v. Passaic Co. Ag. Society*, 54 N. J. L. 260; *People v. Taylor*, 3 Denio, 91.

All statutory rights were fully accorded petitioner. Section 1026 gave the right, but did not impose the necessity,

of trial by jury. It, and the statute which it embodied (17 Stat. 1580) were intended to modify the common-law rule and to give to every defendant, as a matter of right, an opportunity to defend on the facts after an indictment against him had been held good on demurrer. But Congress did not intend to make necessary a jury trial, if a defendant preferred to receive sentence on demurrer, either because he had no defense on the facts, or was content to rely on questions of law on appeal. See *Walden v. Holman*, 2 Ld. Raym. 1015; 7 Wentworth, 347; Keigwin's *Precedents of Pl.*, p. 348.

The practice followed in the case was in strict accordance with the petitioner's right. The judgment overruled the demurrer without more. *Smith v. Harris*, 12 Illinois, 462, 466.

Section 1032, Rev. Stat., is not applicable to this case. 2 Hale P. C. 315.

The common law is legislated into Alaska by § 218 of the Penal Code of 1899 and by § 367 of the act of June 6, 1900 (31 Stat. 321).

Under the common law, as shown, a judgment is final when the party stands on his demurrer. *People v. King*, 28 California, 265. *Re McQuown*, 11 L. R. A. (N. S.) 1136, distinguished.

Section 1026 did not therefore go to the jurisdiction of the court; it merely invested petitioner with a right which he was free to assert, but which he might waive by his voluntary act. When he declined to proceed to trial and persuaded the court to impose sentence on the demurrer, he was bound by his election. *Diaz v. United States*, 223 U. S. 442, 454; *Schick v. United States*, 195 U. S. 72; *Queenan v. United States*, 190 U. S. 548, 551; *Rodriguez v. United States*, 198 U. S. 156, 164; *Powers v. United States*, 223 U. S. 303, 312.

This court will decide the case on the present law; that law authorizes the joinder of several offenses, and the

231 U. S.

Argument for the United States.

judgment below will not be reversed if upon rehearing the same order must be entered.

Even if § 43 of the Alaskan Code governed at the time of trial, that section has now been amended to accord with § 1024, Rev. Stat.

An appellate court will decide a matter upon the law in force at the time of its decision; so that an error may become immaterial by reason of a change in the law. *United States v. Schooner Peggy*, 1 Cr. 103; *Pugh v. McCormick*, 14 Wall. 361; *Dinsmore v. Southern Express Co.*, 183 U. S. 115; *Keller v. State*, 12 Maryland, 322; *Muskogee Nat. Tel. Co. v. Hall*, 64 S. W. Rep. 600; *Hubbard v. Gilpin*, 57 Missouri, 441; *Wayne Co. v. St. Louis &c. Railroad*, 66 Missouri, 77; *Myers v. Hollingsworth*, 26 N. J. L. 186, 191. See also *Wade v. St. Mary's School*, 43 Maryland, 178; *Simpson v. Stoddard*, 173 Missouri, 421, 476; *St. Louis &c. Ry. Co. v. Berry*, 42 Tex. Civ. App. 470; *Perry v. Minneapolis Street Ry. Co.*, 69 Minnesota, 165; *People v. Syracuse*, 128 App. Div. 702.

Petitioner could not neglect to make full defense, and speculate on a reversal because of an error of law which in a legal sense occasioned no possible prejudice. *Royal Ins. Co. v. Miller*, 199 U. S. 353, 369.

The amended statute is not *ex post facto* as applied to offenses committed before its passage. It is a mere change in the rules of procedure, which dispenses with none of the substantial protections with which the law surrounds the accused. *Cooley*, Const. Lim. (7th ed.), 326; *Mallett v. North Carolina*, 181 U. S. 589; *Duncan v. Missouri*, 152 U. S. 377; *Hopt v. Utah*, 110 U. S. 57; *Gibson v. Mississippi*, 162 U. S. 565, 590; *Thompson v. Missouri*, 171 U. S. 380, 386; *Hallock v. United States*, 185 Fed. Rep. 417.

As to other statutes, see *Watson v. Commonwealth*, 16 B. Mon. 15; *State v. Ryan*, 13 Minnesota, 370, 376; *State v. Hoyt*, 47 Connecticut, 518; *South v. State*, 86 Alabama, 617; *Mathis v. State*, 31 Florida, 291; *Commonwealth v. Brown*,

121 Massachusetts, 69, 78; *State v. Pell*, 140 Iowa, 655; *Marion v. State*, 20 Nebraska, 233.

Petitioner received no greater sentence than must have been imposed on a conviction of one crime only.

One good count will support a judgment. *Claasen v. United States*, 142 U. S. 140.

Prejudice cannot be shown because the error might have been cured had petitioner gone to trial; if he had been acquitted on all counts there would have been nothing to appeal from.

Where there is a misjoinder of counts in an indictment and a conviction on one only, the error is immaterial. *Myers v. State*, 92 Indiana, 390, 394; *Commonwealth v. Packard*, 5 Gray, 101; *Commonwealth v. Adams*, 127 Massachusetts, 15; *Pointer v. United States*, 151 U. S. 396; *State v. Buck*, 59 Iowa, 382; *Mills v. State*, 52 Indiana, 187.

The error was one of form cured by § 1025, Rev. Stat. *United States v. Nye*, 4 Fed. Rep. 888; *United States v. Durland*, 65 Fed. Rep. 408, 413; *Connors v. United States*, 158 U. S. 408.

The practice in this case is governed by § 1024, Rev. Stat., and not by § 43 of the Alaskan Code.

The Penal and Criminal Procedure Codes of Alaska apply only to the crimes therein mentioned, and not to crimes defined in the Revised Statutes or other general laws of the United States. See 30 Stats. 1253, § 1891, Rev. Stat.; act of May 17, 1884, 23 Stat. 53, §§ 7, 9; *Kie v. United States*, 27 Fed. Rep. 351; Carter's Alaska Codes, p. xvii.

Under the act of 1899 those Oregon statutes which Congress deemed applicable to Alaska were codified.

The Penal and Criminal Procedure Codes are coextensive, and the provisions of the Procedure Code relate only to those offenses defined in the Penal Code.

The general laws of the United States not locally inapplicable, including § 1024, Rev. Stat., are in force in

231 U. S.

Argument for the United States.

Alaska. Section 1891, Rev. Stat., applies to Alaska since it became an organized Territory by the act of May 17, 1884. *Int. Comm. Com. v. Humboldt S. S. Co.*, 224 U. S. 474, 481; *Nagle v. United States*, 191 Fed. Rep. 141; act of May 17, 1884; *Kie v. United States*, 27 Fed. Rep. 351; *Fitzpatrick v. United States*, 178 U. S. 304.

Section 1024 is locally applicable to Alaska. It applies to all courts of the United States. Whenever the District Court for Alaska is exercising the jurisdiction of a district court of the United States the Federal rules apply. *McAllister v. United States*, 141 U. S. 174; *Steamer Coquillam v. United States*, 163 U. S. 346; *In re Cooper*, 138 U. S. 404; *S. C.*, 143 U. S. 494; *United States v. Pacific & Arctic Co.*, 228 U. S. 87. See also *Embry v. Palmer*, 107 U. S. 3, 9; *Benson v. Henkel*, 198 U. S. 1, 13; *Hyde v. Shine*, 199 U. S. 62, 75; *United States v. Haskins*, 3 Sawy. 262; *Moss v. United States*, 23 App. D. C. 475.

A dual system of procedure does exist in Alaska. There is a dual jurisdiction both Federal and territorial. *Ex parte Crow Dog*, 109 U. S. 556; § 10, Code Crim. Proc.; *United States v. Folsom*, 38 Pac. Rep. 70; *Benson v. Henkel*, 198 U. S. 1, 13.

If a dual practice exists as to these things there can be no objection to other differences in practice as applied to prosecutions for Federal crimes. The cases cited by petitioner do not support his contention. *Clinton v. Englebrecht*, 13 Wall. 434; *Hornbuckle v. Toombs*, 18 Wall. 648; *Reynolds v. United States*, 98 U. S. 145; *Miles v. United States*, 103 U. S. 304, 310; *Good v. Martin*, 95 U. S. 90; *Thiede v. Utah*, 159 U. S. 510, 514, are not opposed to the Government's argument.

This case is governed by *Page v. Burnstine*, 102 U. S. 664, 668.

As to the difference between the ordinary Territory and Alaska, see *Thiede v. Utah*, 159 U. S. 510; *Bird v. United States*, 187 U. S. 118.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petitioner was indicted under § 5209 of the Revised Statutes, relating to national banks, and was charged with fifty-six separate violations of the section. He demurred to the indictment on the ground, among others, that it violated § 43 of the Criminal Code of Alaska, known as Carter's Code, in that more than one crime was charged. Act of March 3, 1889, Title II, c. 429, 30 Stat. 1253, 1290.

The demurrer was overruled, to which ruling petitioner excepted. He then gave written notice "of election to stand upon the said demurrer and not further plead and to take advantage of the provisions of section 97 of the Alaskan Code of Criminal Procedure, and to submit to judgment thereunder and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit."

The Government objected to the entry of judgment until the cause had been submitted to a jury for trial and a verdict rendered, urging that § 97 of the Code of Alaska (30 Stat. 1267) did not apply but that §§ 1026 and 1032¹ of the Revised Statutes governed the procedure. After argument, the court ruled that the Federal procedure prevailed in all proceedings in the cause, but that the de-

¹SEC. 1026. In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondent ouster*; and thereupon a trial may be ordered at the same term, or a continuance may be ordered as justice may require.

SEC. 1032. When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.

231 U. S.

Opinion of the Court.

fendant (petitioner) might waive trial by jury, if he so elected, and have judgment entered against him pursuant to the provisions of § 97 of Title II.¹

The court then asked petitioner if he was guilty or not guilty of the crime. Petitioner stood mute, refused to plead, elected to stand on his demurrer and have judgment rendered against him in accordance with § 97. He was then adjudged guilty and sentenced to imprisonment for five years for each of the offenses, to run concurrently, the entire sentence to be completed at the end of five years.

Judgment was affirmed by the Circuit Court of Appeals. 202 Fed. Rep. 457.

The first question in the case is whether § 43 of Title II of the Alaskan Criminal Code applies or § 1024 of the Revised Statutes. They read, respectively, as follows:

"SEC. 43. That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative." 30 Stat. 1290.

"SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The trial court and the Circuit Court of Appeals held, as we have seen, that § 1024 applied, and this is the conten-

¹ SEC. 97. That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him. 30 Stat. 1295.

tion of the Government. Petitioner asserts the applicability of § 43 of the Alaskan Code.

The trial court expressed its recognition of the difference between a district and circuit court of the United States and a territorial court, such as the District Court of Alaska was expressed to be, but was of opinion that when the latter court exercises jurisdiction to enforce the laws of the United States, "not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law," applied. The Circuit Court of Appeals, in a circumstantial opinion, reached the same general result and considered that the Alaskan Code, by its title and some of its provisions, explicitly specialized the crimes relating to Alaska and the procedure applicable to them. The title of the act is, it was said, "An Act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said district"; the enacting clause is, "That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows," and § 2, c. 1, Title 1, provides "That the crimes and offenses defined in this Act committed within the District of Alaska shall be punished as herein provided." It was hence concluded that as the offense charged in the indictment was not one mentioned in the Alaskan Code, it was not one to be governed by the local procedure but was left under the procedure prescribed in § 1024 of the Revised Statutes. The conclusion was fortified by a consideration of the genesis of the respective provisions. The result of the conclusion will be the existence of a dual procedure in the prosecution of different crimes committed within the same territorial jurisdiction. The result may have examples but it is certainly undesirable, and the systematic character of the Alaskan Code indicates a contrary intention.

Section 43 is a continuation of the procedure that had

231 U. S.

Opinion of the Court.

been prescribed for Alaska. The act providing a civil government for that Territory, passed May 17, 1884, c. 53, § 7, 23 Stat. 24, 25 and 26, made the general laws of Oregon applicable to it, and those laws require "that the indictment must charge but one crime and in one form only." It is contended, however, that the laws of Oregon were declared to be the law of Alaska only in so far as they were applicable and not in conflict with the laws of the United States, and that necessarily the provision above-quoted in regard to the indictment was in conflict with § 1024 of the Revised Statutes. And it is further contended that the conflict is not reconciled, or rather that the difference in procedure is not removed, by § 43 of the Alaskan Code. We concede strength to these considerations but there are countervailing ones.

The Alaskan Code is quite an elaborate code of substantive and adjective law, the former containing twelve chapters of definitions of offenses against the person and property, the public safety and the public peace; the other containing elaborate and circumstantial provisions for the indictment and trial of offenders, their sentence and punishment, and a provision for appellate review. It seems to omit nothing of circumstance or detail necessary to a careful and advanced procedure. But its enumeration of offenses does not include all crimes against the United States, does not include the one under review, and it is hence contended that the procedure prescribed does not apply to the crimes not enumerated, and therefore, does not apply to the crime under review. In other words, it is contended that the procedure prescribed is complementary only to the crimes defined and has no broader application, leaving all other crimes to be governed by § 1024 of the Revised Statutes.

It is established that the courts of the Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the cir-

cuit and district courts, but this does not make them circuit and district courts of the United States. It has been hence decided that the manner of impaneling grand juries prescribed for the circuit and district courts does not apply to the territorial courts. *Reynolds v. United States*, 98 U. S. 145, 154. See, as to trial juries, *Clinton v. Englebrecht*, 13 Wall. 434. In the latter case it was said "that the whole subject matter of jurors in the Territories is committed to territorial regulation" (p. 445).

This principle was applied to the mode of challenging petit jurors, *Miles v. United States*, 103 U. S. 304; to give defendants the right to separate trials and for the regulation of peremptory challenges to jurors, *Cochran et al. v. United States* (Circuit Court of Appeals, Eighth Circuit), 147 Fed. Rep. 206, 207. In *Fitzpatrick v. United States*, 178 U. S. 304, 307-8, it was said that the laws of Oregon must be looked to for the requisites of an indictment for murder rather than the rules of the common law. And this by virtue of the act providing a civil government for Alaska, presently referred to. See also *Thiede v. Utah Territory*, 159 U. S. 510.

In the case at bar there is direct legislation by Congress. Does the principle apply in such case? The first legislation for Alaska was an act of May 17, 1884, entitled "An Act providing civil government for Alaska," § 7 of which was as follows: "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." Chapter 53, 23 Stat. 25, 26. But what constitutes conflict? Mere difference, the Court of Appeals decided, citing *Kie v. United States*, 27 Fed. Rep. 351, 356. That, however, depends upon the purpose. Congress was legislating directly for Alaska; manifestly intended to distinguish it and intended the laws of Oregon to be its laws, regarding them as more suitable to its con-

231 U. S.

Opinion of the Court.

ditions than general laws determined by or addressed to different conditions. See *United States v. Pridgeon*, 153 U. S. 48. And this appears to have been the view taken by the court in other cases.

In *Endleman v. United States*, 86 Fed. Rep. 456, the laws of Oregon were referred to to sustain an indictment to which a demurrer had been filed on the ground that it contained only one count and that several distinct offenses were charged in that count. The case, however, may be said to have only negative value in the discussion. It referred to the Criminal Code as constituting the law of the district but did not refer to or base the decision on that provision which required an indictment to charge "one crime and in one form only." The law of Oregon necessarily was decided to be controlling.

In *Jackson v. United States*, 102 Fed. Rep. 473, 477, the court resorted to the laws of Oregon to determine the qualifications of grand jurors, considering them as applicable under the organic act providing a civil government for the Territory.

In *Corbus v. Leonhardt*, 114 Fed. Rep. 10, the court refused to apply § 858 of the Revised Statutes which provides that in actions by or against executors and administrators neither party shall be allowed to testify against the other, and applied instead the law of Oregon permitting such testimony. And this by virtue of the provision of the act already cited making the laws of Oregon the laws of Alaska.

In *Ball v. United States*, 147 Fed. Rep. 32, 36, it was assigned as error that the trial court overruled the motion of Ball to require the district attorney to furnish him a list of all of the witnesses to be produced against him on the trial in accordance with § 1033 of the Revised Statutes. It was held that the section applied only to the trial of treason and capital cases in the courts of the United States. The court said, "The present case was

tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise." *Thiede v. Utah*, 159 U. S. 510, 514, was cited as holding that § 1033 does not control practice and procedure in territorial courts.

These cases in the Court of Appeals apply the principle of the cases in this court, which we have cited, that Congress by its legislation intends always special regulations for the Territories, to be exercised, it may be, through territorial legislatures or, as in the case of Alaska, by making the laws of Oregon the laws of Alaska, and subsequently by the code enacted for that Territory.

It is, however, the contention, as we have seen, that the limitations of the title of the Alaskan Codes and the omission from them of the crime under review make § 1024 applicable, or, to state it differently, make § 43 of Title II of the Code, which provides that "the indictment must charge but one crime and in one form only," applicable only to the crimes and offenses specifically defined in the act. If it be true that there is such limitation, it would follow that if the laws of Oregon were, before the enactment of the codes, applicable to other offenses in Alaska, they are still applicable. But we are not disposed so to limit the procedure in Alaska. It is, as we have said, very complete and circumstantial. It covers every step in a criminal proceeding, the first accusation, arrest, preliminary inquiry of guilt, duties of officers and magistrates, formation of grand juries, the indictment, trial and its conduct, verdict, sentence and judgment. The reason given for denying its application seems to us not adequate. It is said that § 1024 was originally contained in the act of February 26, 1853, c. 80, 10 Stat. 161, to regulate the fees of clerks, marshals and attorneys of the courts of the United States, and finally became § 823 of the Revised Statutes and by it made applicable to all of the States and

231 U. S.

Opinion of the Court.

Territories. And it is said that the purpose of the act of 1853 and its continuance was to prevent the officers of the United States from increasing their fees by filing separate indictments when the offenses might be properly charged in one. But such a general purpose might easily be considered as yielding to the special provisions for Alaska expressed in the laws of Oregon and declared to be the law of Alaska and in the repetition of the provisions of those laws in the Code of Alaska, that but one offense shall be charged in the indictment. We cannot suppose that the purpose of regulating the fees of officers was more essential and dominant than that special provision, to have no effect as to the great body of crimes of ordinary and everyday commission defined in the Code, and yet apply to offenses less frequent.

By an act of the territorial legislature, approved April 26, 1913, c. 39, Session Laws, 1913, § 43 was amended so as to permit the joinder of two or more offenses or crimes of the same class in one indictment in separate counts, and it is hence contended by the Government that the act makes valid the indictment in the case at bar. It is therefore insisted that "the only result of a reversal will therefore be that petitioner will be re-tried under the present indictment or under a new indictment identical in form." If the trial court erred, it is further insisted, the error has become immaterial.

We are not disposed to give the act retrospective operation, so as to give validity to indictments found before its enactment, assuming for the argument's sake that it could have been given such operation. The evil of so considering it is manifest. Petitioner stood on his demurrer in reliance upon the then existing law, and fault cannot be imputed to him for doing so. Had the law been different his pleading might have been different, and instead of submitting to judgment he might have contested the charges against him. This is certainly a substantial right. The Govern-

ment seems to urge that he was in fault for not contesting the charges and by not doing so took all chances of the change of the law, and that besides, it is urged, he received no greater sentence than must have been imposed on a conviction of one crime only, as the minimum sentence under § 5209 is five years. It is contended that the principle that one good count will support a judgment is applicable. But this overlooks the right of petitioner to have defended against the indictment, the right which, we repeat, he did not lose by pleading its defects under the then existing law.

It is contended by petitioner that the trial court in imposing sentence and judgment upon him denied him the constitutional right of trial by jury, and that, the offenses charged against him being felonies, he was without power to waive a jury trial. Of this contention, we are not required to express opinion, having found the indictment against him insufficient.

Judgment reversed and cause remanded to the District Court for the District of Alaska, Division No. 1, with directions to sustain the demurrer to the indictment.